United States Court of Appeals

for the Second Circuit

APPENDIX

76-1267

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM RODMAN and WILLIAM ROSENBERG,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

(Volume II—Pages 439 to 759)

MORTON BERGER
Attorney for Appellants
13 Eastbourne Drive
Spring Valley, N. Y. 10977
(914) 425-6484

ROBERT B. FISKE, JR.
United States Attorney for the Southern District of New York
United States Court House
Foley Square
New York, N. Y. 10007
(212) 791-0108

UNITED STATES COURT OF APPEALS
FILED
JUL 30 1976
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

INDEX

Docket Entries	1a
Indictment	6a
Judgment as to William Rodman	11a
Judgment as to William Rosenberg	12a
Transcript of Trial Proceedings	1 *
Motions to Dismiss	540
Summation of Government	569
Summation for Defendants	612
Charge of the Court	699
Requests to Charge	745
Juries Verdict	754

* Original page numbers of trial transcript have been retained for clarity and convenience.

GOVERNMENT'S WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Lewis Scala	34	42	44	45
Jack Kenneth Noonan	47	70	196	200
Roy L. Patterson	203			
Timothy M. Jossin	205			
Rose Jossin	206			
Andrew John Calvin	208			
Lloyd J. Landow	210	210		
Victor Quadri	212			
Sid Protas	218			
Arthur Fine	220	221		
Leon Nash	270	275	277	277
Joel Elliot Marcus	278	287		
Rose Lamattina	301	306		
Charles Marcus	307	317		
Adam Ritter	319			
Nicholas Shaheen	321			
Thomas Patrick Doonan	332	356	378	382
Arthur Pendrick	386	405	416	423
Robert Sunshine	460	477	518	535

DEFENDANT'S WITNESS INDEX

Elaine Winter	549	552		
Rosemary Rodman	553			

UNITED STATES OF AMERICA
vs. 76 Cr. 43
WILLIAM RODMAN and
WILLIAM ROSENBERG.

CLERK'S COPY
RETURN TO COURT REPORTERS
ROOM 803 FOR FILING

New York, March 29, 1976;
9.00 A.M.

Trial resumed.

(The following in the absence of the jury.)

THE COURT: You were late, Mr. Berger.

MR. BERGER: Your Honor, I am sorry; I apologize to the Court.

MR. LOWE: Your Honor, I intend at this point to go into some matters about the relevance of certain evidence. However, before I do that, Mr. Berger has indicated off the record that he was suffering from an ulcer attack this morning and was taking some medication. He indicated that he did not desire any postponement as a result of this, and I would simply like to make that a matter of record so that no claim is later made about this problem.

MR. BERGER: Your Honor, I feel fine.

THE COURT: This is the time of the year for an ulcer to kick up, with a change in weather.

MR. LOWE: Your Honor, let me just state in general that the evidence I am now offering in terms of

kp2

relevance all relates to the question of the accumulation by Mr. Rosenberg of approximately 150,000 shares. All of the evidence relating to that is not yet before the Court. However, I believe a sufficient amount is, so that I can establish the various documents which I have previously identified and authenticated

The government will offer Xerox copies of pages from Government's Exhibits 7, 7-A and 7-B, which your Honor will recall were identified by Mr. Scala as the customer ledgers of John Maher. The pages that we will offer will be the pages to demonstrate the accounts of Andrew J. Calvin, Federal Acceptance Company, Lloyd Landow, who was a witness here, Roy L. Patterson, who was also a witness here; Adam Ritter, Michael Scott and the Estate of Theodore Muollo; Timothy and Rose Jossin; Sid Protas, who was also a witness, and I believe that is all.

The government will also offer customer cards, Government's Exhibits 7-C for identification, of A.J. Calvin, Federal Acceptance Company, Roy L. Patterson, Adam Ritter and Michael Scott.

The government will also offer the following checks: Government's Exhibits 8 --

THE COURT: Patterson and Calvin.

MR. LOWE: The Patterson and Calvin checks,

your Honor.

THE COURT: Yes.

MR. LOWE: Also Government's Exhibits 8, 8-A, 9, 9-A and 9-B for identification.

THE COURT: Some of these checks go away before --

MR. LOWE: Your Honor, the point of it will be to demonstrate that the Calvin and Patterson accounts were in fact at all times controlled by, in effect, nominees for Mr. Rosenberg; and we will prove through our last witness -- Mr. Rosenberg and our last witness, the checks to support that theory which we are espousing, that at least these accounts were nothing but nominee accounts.

The government will also offer, and in this instance we need to have a remarking done because through my own negligence I marked two exhibits with the same number. We initially identified the record of Mr. Rosenberg's bank account as Government's Exhibit 12 for identification, and by negligence I also identified the returned letter addressed to Mr. Michael Scott from my office as Exhibit 12 for identification.

For the purpose of clarifying the record it appears to me that the best and easiest thing to do is to change the marking on the returned letter to Mr. Michael Scott from Government's Exhibit 12 for identification to

kp4

Government's Exhibit 12-A for identification.

THE COURT: All right.

MR. LOWE: And I will also be offering both of these documents, your Honor.

I will offer Government's Exhibit 12-A, simply to prove that Mr. Michael Scott -- it is a further piece of evidence that he does not live at that address in Bloomfield, and that Mr. Protas lives in that place.

Government's Exhibit 12, the bank account of Mr. Rosenberg, is relevant to two things, your Honor -- primarily these, that the account number of Mr. Rosenberg is endorsed on the back of various Calvin and Patterson checks, and as you go down, taking those checks you can find them corresponding by date and amount to the deposits made into William Rosenberg's account. You will recall that Mr. Quadei from the Chemical Bank testified that the checks had been deposited into the Chemical. That is further evidence, we claim, to show that these accounts were nominee accounts for William Rosenberg.

T2 I will also, your Honor, be recalling Mr. Charles Marcus. The last time that Mr. Marcus was here I had not been able to locate, and I have since located, checks in the name of Michael Scott which Mr. Marcus cashed for Mr. Rosenberg. Again, this is further evidence that the Michael Scott account was a nominee account.

The purpose of all of the other accounts, your Honor, is that the customer pages indicate deliveries out from those accounts of certain amounts of shares of Franklin Properties stock. They showed deliveries out of 8000 shares to Mr. Scott, 7700 --

THE COURT: What is the total amount?

MR. LOWE: From the accounts the amounts either delivered out or in the firm trading account, because unfortunately I have added them together, 44100 shares.

We will prove through another witness that 261,960 shares were delivered to Mr.Rosenberg by this witness, and that various of them were sold through the Calvin, Patterson, Federal Acceptance Corporation accounts, all of which this witness will testify were nominees; 12,400 remained in the Calvin account or were deliveredout. It is not clear from the entry on the page. 80,000 were returned to the witness leaving a balance of 130,000 shares, which. when added to the other share total up to more

than 150,000 shares which we claim were in the custody and possession, or at least in the control of, [illegible] Rosenberg.

MR. BERGER: Your Honor, at this time I am not prepared to say that the evidence being offered by the government is not probative.

THE COURT: That's a good start.

Is there any of it that canbe eliminated or any of it that is contained -- you have his full bank account. Maybe that's Mr. Rosenberg's argument rather than yours.

Is there any way we can block it out, or is there anything in there that is going to be prejudicial?

MR. LOWE: All it is is a lot of numbers and things of that nature.

THE COURT: Does it show an excessive amount of funds?

MR. LOWE: No, your Honor.

THE COURT: Certainly the parts you want to offer are probative.

MR. LOWE: The largest balances I can see are a little over $5000 at any one time. I don't see any real -- there are a couple here that show $12,000.

THE COURT: Today that doesn't mean anything.

MR. LOWE: There is nothing in it that I feel

will be particularly prejudicial. The purposes I have are to demonstrate the number and the deposit of the checks.

MR. AIDALA: The prosecutor is trying to establish, I believe, Mr. Rosenberg had accumulated, at the time of the dates in the conspiracy, approximately 150,000 shares. What I have been listening to, apparently all that evidence would show is that, in fact, Mr.Rosenberg divested himself of that amount. In other words, the total I am given, these are shares that Mr.Rosenberg had sold and he had gotten moneys for. That certainly is not evidence of an accumulation. Quite to the contrary: it is evidence of a divestitute, and it would not be probative or relevant and merely would be an attempt to create a surmise if there were some nominee accounts that therefore it might be possible for him to get that amount.

MR. LOWE: Mr. Aidala doesn't understand the point. The point is, for example, that in the Scott account it shows in the fall of 1975 a delivery out of that account of 8000 shares, and we claim that it leads to a reasonable conclusion for the jury that the Scott account was an account for Rosenberg to deliver out -- was a delivery to Mr. Rosenberg -- where he maintains control of those shares. The same is true of the other accounts.

THE COURT: It is a conclusion that might be reasonably drawn from the evidence that is in here, yes.

MR. BERGER: I would like to be heard on that point.

I feel that if the Calvin account, or the Federal account, had Franklin Properties stock in it, then, of course, what I said before about it being probative evidence, that's my position. On the other hand, if the government is contending that the Calvin account, the Federal Acceptance account, were nominees of Mr. Rosenberg and thereafter the stock, as Mr. Aidala said, was taken out of the account, that does not show the accumulation. That will show divesting himself of an interest. I don't think you can assume and have a fair inference that once you have a nominee account and believing that account is a protected nominee account, Mr. Rosenberg would then divest himself again. I don't think that is a fair inference. A fair inference is that perhaps Mr. Rosenberg sold the stock, and I think a fair inference could be drawn from the checks which would show that money went through Mr. Rosenberg's account. So, obviously, it is proof of divesting himself.

THE COURT: Why not a fair inference that when he got those he held them and had them in a blank name or in his own name, held them and could have done anything he

pg5

was had with them? That's a matter of inference that the jury might or might not draw.

MR. BERGER: Not if there were checks also drawn from the Calvin account and shows a change from stock into cash.

THE COURT: Maybe that's something you can argue to the jury to see if the jury can view it one way or the other.

MR. LOWE: We do claim and admit the sales to Calvin and Federal Acceptance. They are important to demonstrate how much of the stock remained in Mr. Rosenberg's control.

THE COURT: That's something you can argue to the jury.

MR. AIDALA: Another item, your Honor, I think is Government's Exhibit 12-A, about Michael Scott. I remember specifically questioning the witness and the witness testified that she had no idea of when that envelope was mailed out. She had not mailed it out. The fact of the matter is --

THE COURT: Is there any date on it?

MR. LOWE: No, your Honor. However, there is a date on what is inside.

THE COURT: What is the date on what is inside?

MR. AIDALA: That was not offered, your Honor.

THE COURT: The whole thing is to be offered?

MR. LOWE: Yes, your Honor.

THE COURT: It is being offered now?

MR. LOWE: Yes.

THE COURT: Look at what is inside before we see what goes in.

MR. LOWE: I would not think they would want what is inside to go in evidence.

THE COURT: What is the date?

MR. LOWE: February of this year.

MR. AIDALA: It is after the indictment. Anyone would have been alerted to that fact and it is not difficult to understand why they would not accept that.

THE COURT: Why, if it is subsequent to the indictment, is it admissible?

MR. LOWE: What it proves is that at least at that time Mr. Scott did not live there. It supports the testimony of Mr. Protas and also shows that the records of John Maher would show Michael Scott at 100 Bellevue Terrace, Bloomfield, New Jersey.

MR. AIDALA: That's February, 1976. It is obvious that it is beyond the date we are concerned with. You cannot prove that because on February 26 someone was

not accepting the mail, that someone didn't accept the mail, in that name back in December.

THE COURT: February bothers me.

MR. LOWE: It would be impossible for us to have proved anything like this while the crime was going on.

THE COURT: Except you have proved by the person who lived there that he was the only one that lived there at that time. It isn't sufficient. Granted you are trying to show it is corroborative, but there is no mail addressed to him. The conspiracy terminates on December 8th or something. You have your proof in. This does not add to it. I don't think 12-A being in February is admissible. I think everything else is.

MR. LOWE: I think I might argue the point, but I think it is a well-taken point.

I also agree it may not be that important to us.

MR. AIDALA: As to the other things, he mentioned Mr. Calvin. I will use him as an example. What happened is that we have had someone up to this point as Mr. Calvin get on the stand who said his name was A.J. Calvin and had no account at John Maher and knew nothing of Box No. 721. Well, Judge, to me that means that there is no connection up to this point at least between that individual and the individual who was on the card in John Maher. That

individual's testimony is that he knows nothing about it.

It will be just like if there was a name John Smith and we picked a John Smith out of the phone book in Denver, Colorado, and said, "Mr. Smith, do you know John Maher?"

He says, "No."

"Do you have a box numbered 123?"

"No."

Your Honor, there is no connection there. The fact of the matter is that you can do that with anyone.

I think I read something somewhere where he didn't even use that name, but it is proof of nothing, Judge, except that this one individual who has that name is not the individual on the card. I don't know how many other individuals in Denver -- I know of at least one other, by virtue of something I read, who has the same initials, the same name as Mr. Calvin, who is a relative and may be his son -- but I don't know how many people in Denver, Colorado, have the initials A.J. Calvin. So there has been no connection between that particular witness and the name on any card that they are trying to introduce into evidence.

How do you jump the gap? How do you say to the jury that because thisman has the same name, that he knows nothing about it, that that's the man whose name appears on

the card?

THE COURT: Without the necessity of the defendants taking the stand, there are certain ways they could show by their records that there was a certain Andrew J. Calvin in Denver, Colorado. I state emphatically that the defendants are not required to prove anything or take the stand, but when evidence comes in and it can be refuted, it doe not mean that the defendant has to take the stand to do it, but you take chances with it. It may go to the weight of the evidence as to how many Andrew J. Calvins, and so forth, but certainly not to its admissibility.

MR. AIDALA: Any John Smith could be put on the stand and say, "No," and that's fine. The defense must then put on 5000 other John Smiths.

Your Honor, isn't the burden on the People?

THE COURT: Yes.

MR. AIDALA: The connection must be shown.

THE COURT: The pattern that has been shown in here, this is admissible. That's my thought.

MR. AIDALA: I respectfully except.

THE COURT: Is that all we have?

MR. LOWE: I will be offering, your Honor, pursuant to an agreement made with defense counsel, without calling witnesses involved therein, Government's Exhibit 1 from the

pg10

same as the last trial, records of the Holiday Inns; Government's Exhibit 2-A, the phone records of John Maher, and the line card from the last trial.

MR. AIDALA: The same stipulation concerning mailing that we had.

MR. BERGER: Mr. Lowe has not put on that witness from Leyner, Dreskin who testified as to mailing the last time.

THE COURT: I think he feels he does not need that because of the testimony that is in the case.

MR. LOWE: That is correct, your Honor. I don't see any point in doing it over and over again.

THE COURT: There is sufficient testimony in here that a reasonable person might believe that the mailing was used in connection with this.

MR. BERGER: I don't agree with that.

THE COURT: Was it through the last witness?

MR. LOWE: The controller of John Maher, the cashier, Mr. Scala. We had testimony also from Mr. Noonan on the point.

THE COURT: The first witness, yes.

MR. BERGER: While we are at the stipulation, the defense has anticipated that Mr. Lowe will agree to the same stipulation on Mr. Rodman's phone bill.

MR. LOWE: Absolutely.

MR. BERGER: And on the stipulation with regard to the motion made on October 20th and denied in the Supreme Court of Kings County.

THE COURT: The docket sheet, or whatever they call it.

MR. BERGER: The docket sheet and the motion. The same evidence we had last time.

MR. LOWE: I don't think that the documents regarding the Brooklyn case should go into evidence. I think the stipulated facts that they reflect should, but I don't think that the documents should.

MR. BERGER: The document that did not go in was the actual denial of the motion. But the calendar that we put in last time, I do intend to put in showing the date of the indictment, the date of the dismissal, and all of that, the fact that it was on the motion of the People of the State of New York, and not that it was denied.

MR. LOWE: Rather than put that piece of paper in for whatever else may be made of it, a stipulation as to the dates, various things that happened, is a substitute for putting the paper in.

MR. BERGER: I would like to have the paper in.

THE COURT: Is it here?

pg12

MR. BERGER: Yes.

MR.LOWE: I will stipulate that that is the paper.

MR. BERGER: I am not asking to put in the document in which --

THE COURT: Show him what you want to put in.

(Pause.)

MR. LOWE: I will have no objection to having this piece of paper go in.

MR. BERGER: In addition, the stipulation that we had that the motion was denied on October 12th, we are not putting in the document because of other matter in the document.

THE COURT: Is that satisfactory?

MR. LOWE: Yes, your Honor. I think that that is satisfactory.

MR. AIDALA: There is the other thing about Mr. Noonan being the informant for two years.

MR. LOWE: What about it?

MR. BERGER: Your Honor, we have the letter from the government in which the government said he was an informant for two years. I think the government should stipulate to that. I think the facts in and of themselves show that, even if he were not an informant -- your Honor's

pgl.19

instructions to the jury -- even if he were not a government informant in the sense that we most of the time think of it, he does meet the requirements as set forth in your Honor's instructions as an informant, and I believe that that instruction is sufficient, that he is an informant pursuant to that instruction.

MR. LOWE: What has bothered me about this point all along is simply this: in terms of his being a paid informant, first of all, the evidence on that is very slight, indeed.

THE COURT: I don't like to cut you off, but I really don't think you ought to get into it. I think under the circumstances of this case that that is a fact and we really should not get into it any deeper.

MR. LOWE: My point is this: I think it is fair to say and to charge the jury that if they find that Mr. Noonan had an interest, they can consider that in determining his credibility; but I think to use the terms which go back to an old Victor McGlaughlin movie, terms of disparagement to the general public, I think it is unduly prejudicial in light of the fact that Mr. Noonan got a total of $900, a large total of which was advanced or reimbursement expenses.

mkp1

T3

THE COURT: Well, except "informant" not only involves the payment of money but it involves other considerations.

I really think you are pressing an issue which --

MR. LOWE: Your Honor, it is the use of the word that I am concerned about. I am not concerned with the -- I do not see any reason why you cannot tell the jur to the effect that Mr. Noonan admitted having an interest and having an interest in helping the government, and hopi to get something out of it from the government and all tha kind of thing, but I think the use of the term in this cas is really not justified. It is the term more than anything else that I object to because of the emotional connotations that go along with that term in the minds of the general public.

THE COURT: I do not buy it here, I really don' in other cases, but I won't buy it here.

MR. BERGER: Your Honor, with regard to one other matter I rewrote my instruction of the 24th on mailing. Shall I hand it up now?

THE COURT: Yes.

(Mr. Berger hands to the Court.)

MR. AIDALA: Judge, there is one other thing

mkp2

that came to my attention. Friday a fellow from the Check Cashing Service testified. Mr. Lowe had provided me with the name of an individual, and then Friday morning he informed me that the individual's actual name was other than this individual named in the communication to me.

I wondered over the weekend how they obtained this checking cashing individual. This morning I spoke to Mr.Rosenberg, and it has been brought to my attention that months ago, while I assumed that Mr. Rosenberg and others were targets of the investigation, Mr. Rosenberg was questioned without an attorney in the U.S. Attorney's Office, and what has been described to me as certain threats being made to him.

The information concerning this particular check cashing individual was elicited and obtained from Mr. Rosenberg.

Now I think, Judge -- and to make the record clear, Mr. Rosenberg has not alleged that it was Mr. Lowe himself but another individual.

The fact of the matter is, Judge, that it now appears to me that this evidence was or may very well be or have been illegally obtained, and the fruits of the poisoned tree doctrine I think may pertain here. I wished that had been brought to the Court's attention before I

answer that we could have had motions, which should be done prior to trial, but it was not done. This individual did not testify at the first trial, and Friday suddenly appeared to testify.

Based on this knowledge, Judge, I am going to move to strike his testimony.

MR. LOWE: I have not indicated any evidence whatsoever on which to base any allegation by Mr. Aidala at this time, and I think until that time comes his application is not well taken.

MR. AIDALA: I am making an allegation.

MR. LOWE: Allegations are not sufficient.

MR. AIDALA: I am sorry, Judge, this --

THE COURT: Gentlemen, it is now a quarter after 10. This is a matter that we can take up at another time. Let us get the jury in and finish up what we have in the way of testimony, and we will take this up at our recess and not the jury's time.

MR. AIDALA: Except that he says he is going to recall him.

MR. LOWE: I found two checks that I did not ask him about before, that I would like him to testify about.

MR. AIDALA: Judge --

THE COURT: It is going to be the same thing.

It will not change this. I will listen to you then. I do not have to listen now.

MR. AIDALA: Except that it may be worse, it may be compounded.

THE COURT: What is it -- two checks, and maybe 30 on the other?

MR. AIDALA: Judge, we will stipulate, if he testified, that he would testify that these are the two checks.

May I see the two checks?

(Mr. Lowe hands to Mr. Aidala.)

MR. AIDALA: Without waiving our right.

THE COURT: I understand.

MR. LOWE: You are prepared to stipulate that Mr. Marcus would testify --

THE COURT: That he cashed these checks in the same manner that he did for Mr. Rosenberg.

MR.LOWE: Yes, to Government's Exhibit 10 for identification.

MR. AIDALA: Is that what he would so testify to, Mr. Lowe?

MR. LOWE: That is what he will so testify to.

MR. AIDALA: Then I will accept his representation.

MR. LOWE: Fine.

THE COURT: All right, bring the jury in.

Who is your next witness?

MR. LOWE: Mr. Robert Sunshine.

THE COURT: Mr. Sunshine on the stand.

(Jury in box.)

THE COURT: Good morning, Jurors.

JURORS: Good morning.

THE COURT: We are waiting for the witness to be produced.

MR. LOWE: The government calls Mr. Robert Sunshine.

R O B E R T S U N S H I N E, called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LOWE:

Q Mr. Sunshine, do you know the defendant in this case, Mr. William Rosenberg?

A I do.

Q Do you see him here in the courtroom today?

A Yes, sir, I do.

Q Will you point him out for the record, please?

A He is the gentleman in the tan coat and --

MR. AIDALA: We concede the identification.

THE COURT: All right, identification conceded.

Q Mr. Sunshine, how long have you known Mr. Rosenberg?

A Approximately six years.

Q In general, what is the nature of the relationship you have had with him over that period?

A With him as a stock broker on behalf of myself and a company which I have been involved with over that period of time.

Q Are you familiar with a company known as Franklin Properties, Inc.?

A I am.

Q What, if anything, is your relationship to that company?

A Well, primarily a business adviser. At one time I was an officer for a short period of time.

Q Have you had either a direct or beneficial interest in any of the stock of Franklin Properties, Inc.?

A Yes, sir.

Q So that the jury understands, would you explain the difference between a direct interest and a beneficial interest?

A Well, as I understand it, a direct interest would

be an interest -- the interest in stock which I would own personally.

A beneficial interest, as I understand it, would be stock in which perhaps a member of my family owned the stock or someone of a close nature of that kind.

Q Mr. Sunshine, do you know the meaning of the term "nominee"?

A Yes, sir.

Q Will you tell the jury what that means?

2 A My understanding of that term is a stock in someone else's name which is actually yours. In other words, you nominate that person to hold the stock in his name, but it is actually yours.

Q Do you know a person named Andrew J. Calvin?

A Yes, I do.

Q Is he also known as A.J. Calin?

A Yes, sir.

Q Where does he live?

A He lives in Denver.

Q Do you know his address?

A Not offhand. It is in the northeast area of Denver.

Q Do you know a person named Roy L. Patterson?

A Yes.

Q Is he also known as R.L. Patterson?

A Yes.

Q Where does he live?

A He lives in South Denver.

Q Are you familiar with a company known as Federal Acceptance Company?

A Yes, I am.

Q Were those persons and that company nominees for the purpose of holding the stock of Franklin Properties, Inc.?

A I would say so, yes.

Q For whom were they nominees?

A Basically for me.

Q Anyone else?

A Not to my knowledge, no.

Q Did you ever discuss with Mr. Rosenberg those three nominees?

A Certainly.

Q Did Mr. Rosenberg have any interest in the accounts of those three names?

MR. AIDALA: I will object to that. That is a conclusionary term.

THE COURT: No, I will permit it.

Q You may answer.

THE COURT: You said Mr. Rosenberg had some

relationship with those nominees.

THE WITNESS: Yes, sir.

THE COURT: What was that relationship?

THE WITNESS: I would send stock in those names to Mr. Rosenberg.

Q For what purpose?

A Well, for their accounts, for the purpose of sale.

Q And what would be done with the proceeds?

A Well, for aperiod of tima Mr. Rosenberg and I divided the proceeds on those. Thereafter, I don't know what was done with the proceeds.

(Mr. Lowe hands to the witness.)

Q Mr. Sunshine, directing your attention to a book which has been marked Government's Exhibit 13 for identification, can you identify that book?

A (After examining) I use glasses, I find, as I get older.

Yes, sir, I can.

Q What is it?

A This is a personal ledger book of mine.

Q Directing your attention -- have you had occasion over the last several days to review that book and the information contained in it?

A Yes, sir.

Q And did you make a summary of certain facts that are contained in that book?

A I did.

Q Directing your attention to Government's Exhibit 13-A for identification, which is annexed to the book, did you write that down? Did you write this information contained on that document?

A Yes, sir, I did.

Q And does that reflect a summary of certain information contained in your ledger book?

A Yes, of certain information.

Q And specifically, without telling us the number or anything that is written down there, what information did you make a summary of?

A I made a summary of the shares of Franklin stock sent to Mr. Rosenberg.

Q And is that the information that is contained on Government's Exhibit 13-A?

A Yes.

MR. LOWE: The government offers 13-A in evidence (handing).

MR. AIDALA: Judge, under the rules of evidence it is inadmissible;

THE COURT: 1006 -- Rule 1006.

MR. AIDALA: I object to this.

THE COURT: Do you want to see Rule 1006?

MR. AIDALA: I object to the introduction of this piece of paper with some writing on it.

MR. BERGER: Your Honor, basically the objection is that it is not a summary as set forth in 1006. It is a conclusion, so it does not show in summarized fashion what was taken into consideration to arrive at the --

THE COURT: Do you want to look at Rule 1006?

MR. BERGER: I have it.

THE COURT: You have it there? Take a look.

MR. AIDALA: Yes, your Honor.

THE COURT: I think you should take a look at this. Yes, but take a look at this, too (indicating), and then take a look at Rule 1006 (handing).

MR. BERGER: I agree that this is the rule, but what I am saying is that that document does not meet the rule.

THE COURT: It is a calculation.

MR. AIDALA: Especially the last --

THE COURT: It is a calculation.

MR. AIDALA: Especially the last part of the rule.

MR. BERGER: It is an end result.

THE COURT: Well, I disagree with you gentlemen, based on Rule 1006.

MR. AIDALA: Your Honor, the last part of the rule sets forth the prerequisite before that is done, namely, and that has not been done.

THE COURT: The full ledger is right here (indicating).

MR. LOWE: And, if your Honor will recall, at a luncheon break last week I made reference to the discovery of evidence, which was offered at that time for inspection by the defense. They have never availed themselves of the opportunity.

MR. AIDALA: Judge, we were there and I don't recall ever seeing that.

THE COURT: Yes, it is here -- if you want to look at it, the ledger is here. If you want to do that, it is available.

MR. AIDALA: In addition, Judge, I will object on the further ground that there is no time period. Is this a matter of years or months or days?

THE COURT: Maybe that will be developed.

xx (Government's Exhibit 13-A received in evidence.)

BY MR. LOWE:

Q Mr.Sunshine, after delivering the number of shares referred to in Government's Exhibit 13-A to Mr. Rosenberg, did you receive any shares back from him?

A Yes, sir.

Q How many shares did you receive back?

A Somewhat in excess of 80,000 --

MR. [illegible]LA: May I object unless a time period is set, your Honor?

THE COURT: All right, establish a time period, Mr. Lowe, for these transactions.

Q Over what period of time did you deliver this stock to Mr. Rosenberg?

A May I refer to the ledger, sir?

Q Certainly.

A (After examining) Roughly from June of 1974 to May, 1975.

Q When did you receive back the amount of stock that you got back, approximately?

A I would say approximately the Fall of '75.

Q And how many shares did you receive back?

A Somewhat in excess of 80,000 shares.

Q How much in excess of 80,000?

A It would be between eighty and ninety thousand

shares.

Q Now directing your attention to Government's Exhibit 13-B for identification, do you recognize the handwriting on that document (handing)?

A Yes, sir.

Q Whose handwriting is it?

A It is Mr. Rosenberg's handwriting.

Q Where did you first come upon that document?

A It was sent to my office in Denver.

Q And have you kept it until the time you turned it over to me?

A Well, I gave it to the transfer agent who was associated with the same office for a period of time, and then it was returned.

Q Returned to you?

A Yes.

Q And then you kept it until you turned it over to me last week?

A Yes.

THE COURT: Is it in the same form that it was when you turned it over to the transfer agent?

THE WITNESS: It certainly was.

MR. LOWE: The government offers 13-B in evidence (handing).

MR. AIDALA: May I have a voir dire, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. AIDALA:

Q Is it your testimony, Mr. Sunshine, that everything written on this document is in your opinion in the handwriting of Mr. Rosenberg (handing)?

A (After examining) No; the pencil notation at the top is in my handwriting saying "Cancel and Reissue."

Those were the directions that I gave to the transfer agent in accordance with the letter.

MR. AIDALA: Judge, I am going to object to that. I do not see any relevancy to that document.

THE COURT: May I see that, please?

(Witness hands to the Court who examines.)

MR. AIDALA: Especially the date thereon, and the year.

THE COURT: No, I will receive it.

xx (Government's Exhibit 13-B received in evidence.)

DIRECT EXAMINATION CONTINUED

BY MR. LOWE:

Q Mr. Sunshine, I would like to direct your attention to Government's Exhibit 8-B for identification and

3

Government's Exhibit 9-B for identification (handing), and I direct your attention specifically to the back of each.

(Witness examines.)

Q Who put the endorsements on those checks?

A I did.

Q How did you receive those checks?

A Through the mail.

Q From where?

A From Mr. Rosenberg or John Maher.

MR. AIDALA: I ask -- did he correct his answer?

THE COURT: He did. He said from John Maher.

THE WITNESS: Yes, sir.

Q The second endorsement on those checks, Mr. Sunshine, what is it?

A The endorsement is for a deposit to Agency Company on both checks.

Q What is the Agency Company?

A That is a company with which I am associated.

Q Directing your attention, Mr. Sunshine, to the first page of what has been marked as Government's Exhibit 7-C for identification, I ask you to look at that -- just to yourself, and when you are finished looking at that let me know when you are finished (handing).

(Witness examines.)

A The first page only?

Q The first page only.

First of all, let me ask you this: does that refresh your recollection as to the address of Andrew J. Calvin?

A I didn't notice that, I am sorry.

(Mr. Lowe hands to the witness.)

A (After examining) Not as -- yes, it does.

Q What is the address?

A 3340 Ivy Street would be the resident's address.

Q Who signed that card?

A I'm sure that I did.

Q Directing your attention to the second page of Government's Exhibit 7-C for identification, who put the signatures on that card (handing)?

A (After examining) I'm sure that I signed Mr. Calvin's name. The other I am not sure about -- that's my daughter's.

Q Is it your daughter's signature?

A I can't be sure. It could be, or I may have signed it.

Q Now if I might direct your attention to Government's Exhibit 13-C for identification (handing).

(Witness examines.)

Q Do you recogniza the handwriting on that piece of paper?

A Yes, sir.

Q Whose handwriting is it?

A Mr. Rosenberg's.

Q How did you first come into possession of that piece of paper?

A It was forwarded to me by him.

Q How did he come to forward you that piece of paper with that information on it?

A At my request.

Q What did you request him to do?

A To give me an accounting of our affairs.

Q Relating to what?

A The acquisition and sale of Franklin stock.

Q And as a result, after that request was made by you, you received that piece of paper in the mail?

A Yes, sir.

MR. LOWE: The government offers 13-C for identification in evidence (handing).

MR. AIDALA: Judge, I see that this is a year and a half prior to the indictment.

THE COURT: Do you object to it or not on the

basis of its date?

MR. AIDALA: I object to that.

THE COURT: Solely on the basis of the date?

MR. AIDALA: And the relevancy to the charges in this case.

THE COURT: Let me see it, please.

(Mr. Aidala hands to the Court, who examines.)

THE COURT: Overruled. It will be received in evidence.

xx (Government's Exhibit 13-C received in evidence.)

BY MR. LOWE:

Q Mr. Sunshine, how long have you been associated with Franklin Properties?

A May I explain? Since its inception --

THE COURT: Can't you give us a date?

THE WITNESS: Well, I can give a date, but there was a predecessor company which became involved with Franklin Properties, and I was involved with the predecessor company prior to its association. That would have been 1968 -- no, 1967.

Q And you have been involved with the Franklin Properties at least then, since 1967.

A Yes, sir.

Q And are you familiar with the business and operations of Franklin Properties?

A Yes, sir.

Q Mr. Sunshine, when was the last time that Franklin Properties showed an annual profit?

MR. AIDALA: Objection as irrelevant.

THE COURT: I will permit it.

A A net profit?

Q Yes, sir.

A I doubt that it ever did.

MR. LOWE: I have no further questions.

THE COURT: Mr. Berger?

MR. AIDALA: Judge, I would think counsel should have time to examine that ledger book before beginning cross-examination.

MR. LOWE: I do not object, your Honor, providing that it is clearly understood that this book has been available for their inspection since Friday.

MR. AIDALA: Judge, I --

THE COURT: I don't want to hear anything further.

Is that the first area that you want to get into, Mr. Berger?

MR. BERGER: That will be the first area that I would go into.

THE COURT: All right, members of the jury, we will take a recess -- the duration of which I cannot tell you, but we will take you back as soon as we can. Relax and be comfortable.

(Recess.)

t3

THE COURT: Bring the jury in.

(Jury present.)

THE COURT: Mr. Berger?

MR. BERGER: I have no questions.

THE COURT: Mr. Aidala.

MR. AIDALA: May I have Government's Exhibit 13A?

(Pause.)

CROSS EXAMINATION

BY MR. AIDALA:

Q Mr. Sunshine, when did you come up with this figure that's listed on 13A?

A That would have been just this last Thursday night, I believe.

Q Where did you come up with that figure?

A It was in the office of the United States Attorney.

Q Who was present at that time?

A I believe Mr. Lowe and the young lady, and there may have been one or two other people there. I was given the ledger and the figure and this document to come up with. I don't remember it was in their presence or not.

Q You said you were given the figure?

A No, no. I was given the ledger and I came up with the figure.

Q You made the calculation?

A Yes.

THE COURT: You were given the ledger, and you came up with the calculation?

A Yes.

Q The ledger you are referring to is Government's Exhibit 13, is that correct?

A Yes, sir.

Q Would you be kind enough to tell us when you started keeping that ledger?

A You mean insofar as Mr. Rosenberg is concerned.

Q When did you start keeping that ledger? One step at a time, please.

A I don't recall the date.

Q Do you recall the year?

A I'm sure 1974 or prior to that, although I would assume thatsome of the previous years are not here because there were no lonter currentthings that I'm working with.

Q What period of time were you asked to calculate the figure for?

A For who?

Q For Mr. Rosenberg. That's the only one we are interested in.

A The entire period of time I believe that we were doing business together.

Q That was prior to 1974, is that correct.

A Well, yes, but this only represents the period relating to this transaction with Mr. -- we had other transactions prior to this as far as Franklin Properties is concerned.

Q Can you tell the jury the date, the beginning date and the final date, that that figure represents?

A It represents 1974 and 1975.

Q Can you tell us when in 1974 to when in 1975?

A It would appear from June of '74 to May of '75.

Q What day in May of '75 was the last time that you sent any stock to be sold by John Maher?

A I didn't say that that was the last date that I sent stock to John Maher. That's what is reflected in the ledger.

Q I'm talking about the ledger. I am directing my inquiry to the figure you came up with.

A Yes, sir.

There was additional stock sent to him after that.

Q Is that part of that figure?

A It's not included in that ledger, no -- in this ledger.

Q Did you add that figure on to your figure?

A Yes.

Q So in other words, if we were to go through that ledger, the figure that you came up with is not an accurate reflection of what is contained in that ledger, is that right?

A No, there was more stock sent to Mr. Rosenberg afterwards. That's what I am trying to tell you.

Q I'm trying to ask you what else did you use to come up with that figure besides that legend.

A May I refresh my recollection?

Q Do you need it to be refreshed at this time?

A I can tell you exactly.

Q What else did you use?

A My memory.

Q Would you be kind enough to point out the first entry in that legend in June of 1974 -- kindly put those papers in your pocket and look at the

ledger.

A Certainly.

Q Would you tell us the first date in June of 1974, where in that ledger you came up with the particular figure you came up with?

A It appears to be June 17, 1974.

Q Are those pages numbered?

A No, they are not numbered.

MR. AIDALA: May I approach and look at it to make it easier?

THE COURT: Yes.

Q That's on the page you are indicating? Is this the page?

A Here it is.

Q June 17, 1974.

How much stock was sent to John Maher to be sold?

A On that date there was sent at Mr. Rosenberg's direction 10,000 shares and at his direction it was sent directly to an Ed Eglowsky, and that is involved in one of the other government exhibits. It was returned by Mr. Rosenberg to me and at his request he asked that it be broken down into ten 1000-share certificates and returned tomorrow to Maher at his home.

Q In other words, there was a total of 10,000 shares sent to John Maher?

A Yes.

Q Were those shares sold according to your records?

A If they were sold there was never an accounting made to me.

Q Did you make inquiry back in 1974 about that?

A My inquiry was in 1975 because we were -- we stopped receiving funds back from him in 1975 and that's when I commenced asking for an accounting.

Q Tell us the second date you say any shares were sent and how much you say were you sent to him.

A It would appear for the A. J. Calvin account, 10,000, 5000, 5000, 5000, 20,000, 3200.

Q I see a name Rickey, 20,000?

A That was the name in which the stock was. That was a nominee's name.

T5

Q That was another one of your nominees?

A Not one of mine, no. I had it in my possession.

Q And you say --

A Let me say that rather than "nominee" perhaps it would be better to use the word "street form" -- in other words, negotiable stock.

Q On the 26th we have 20, 25 --

A Uh huh.

Q Another 32.

A Uh huh.

Q So that totals 28,200 shares, plus another 10,000 on June 17?

A 10, 25, 45 -- 51,200 it would appear.

Q Now there are other notations here indicating amounts of money?

A Yes.

Q Does that indicate moneys that you received?

A Back from Mr. Rosenberg?

Q From Mr.Rosenberg.

A Yes, sir.

Q And those are moneys that were received by virtue of the fact that stock you sent to him had been sold; is that correct?

A Yes, and I would remit a half to him.

Q Where it is indicated, for example, the figure amounts here -- that indicates that you did receive payment for the stock that you had sent to him, is that right?

A Yes.

Q So that, in other words, certain thousands of shares had been sent to him and you received the money for the sale of those stocks, would you assume that he no longer held those shares, is that correct?

A I would assume so.

Q Right.

A Unless he paid for them himself.

Q Well, you had no reason to believe --

A No.

Q So that on this page at least there is evidence, based on your notations, that the stock was sold and you received moneys, and it is reflected as it is reflected on that page, is that correct?

A Yes.

Q Now would you go -- that takes us up to July of 1974; correct?

A Yes, sir. Well, here is some more (indicating). This apparently has to do with that Eglowski business.

Q Was that a transaction whereby certain assets were to be acquired in exchange for stock?

A No, sir.

Q Well, can you tell us, then, what that was, do you remember?

A Well, I tried to explain before that I sent Mr. --

Q Is that the explanation, that you sent directly to Eglowski --

A It came back.

Q -- and it was returned?

A Yes, sir.

Q Can you go beyond July of 1974?

A Here we come to the Calvin account.

Q That is June of 1974, is that right?

A That is right.

Q Can we add up the total that is reflected on that page?

A (After examining) It looks like 10,000, 18,000, 8000, 2000, 2000, 1000, 1000, 2000, 1000, 1000, 1000.

Q If my arithmetic is correct, that is about 37,000?

A Yes. I am sorry, there are no totals on here.

Q All right, if I am wrong, you can tell me.

There are also many figures that are listed here, is that correct?

A Yes.

Q And the word "received", does that indicate that you received money?

A Yes, sir.

Q And am I correct that for every stock, the amount of stock that you sent, there is a notation corresponding to the amount of money you received when that stock was sold by John Maher?

A No, sir.

Q Am I missing something?

A No, sir. There were stocks sent over a period of time and moneys received back for a lesser amount of -- reflecting a lesser amount of stock than was sent.

Q In other words, you received this amount of money on or about the date indicated on here --

A Yes.

Q -- is that correct?

A Yes, sir.

Q And as I am looking at it here, the larger amount of stock sent, it appears that there is an amount --

A Oh, I am incorrect. The figures which I gave you are what is reflected as being sold, but you will notice here is a figure -- these are the shares that were sent, and at the top I see a notation "50,000 shares." So here there were -- oh, this was my running balance,

you see. 10,000 -- thank you for refreshing me -- there were 50,000 at that time; 10,000 was sold, leaving a balance of 40,000 shares of the fifty, and for the 10,000 I received a thousand dollars which I paid him back half.

Q Fine. So this is your running balance; right?

A Roughly.

Q So that as of July 17, there or shortly thereafter in 1974, where you start out with 50,000, it wound up as only 2000?

A No, 8200.

Q And then there is 2000 here?

A I must have sent him an additional 2000.

Q So from all the thousand that we mentioned before, by the end of July, 1974, there were only about 8200 that were still outstanding at John Maher --

A In the Calvin account.

Q Right; fine.

Now would you do the same --

A I will try.

Q -- try and do the same thing -- I would assume that would hold true for the other accounts here, too.

A I don't think it's in as good --

(After examining) Yes, this one would be. This

was the Patterson.

Q And for Mr. Patterson would the same thing be true?

A We start here with 50,000 and we wind up with 24,500.

Q And that is in August of 1974; correct?

A Yes.

Q And there were more sales after that?

A Apparently -- not in the Patterson account.

Q Not even in 1975?

A I don't reflect it, no, no.

Q Then you do not know whether there were sales or not, according to the records.

A It is certainly not reflected here.

Q It is not reflected. As a matter of fact, was that one of your main reasons for asking Mr. Rosenberg to send you an account so that you would know and bring your records up to date?

A That -- yes.

Q And so if there were stocks sold from that 24,500, from 1974 until May of 1975, your records would not accurately reflect that?

A Well, because I didn't receive an account.

Q Right. Now would you take what you say is the

next one?

THE COURT: You are talking about the Calvin account. How many shares in the Calvin account were there at the end?

THE WITNESS: It would appear 8200 shares.

THE COURT: 8200 shares?

THE WITNESS: Yes.

THE COURT: That is what you had at the end of 1974?

THE WITNESS: That would be July of 1974.

THE COURT: July of 1974. Some shares had been sold?

THE WITNESS: Yes, they started with 50,000.

THE COURT: In Calvin's name?

THE WITNESS: Yes.

THE COURT: And you received 50 per cent of the proceeds?

THE WITNESS: Yes.

THE COURT: And the 8200 shares you had at the end?

THE WITNESS: Yes.

THE COURT: Did you return them to Mr. Rosenberg?

THE WITNESS: No, sir, he had them.

THE COURT: Oh, he had them?

THE WITNESS: Yes.

THE COURT: He had them at all times.

THE WITNESS: Yes.

Q In other words, that is what was left from the original amount?

A Yes, we started with 50,000.

Q By the way, when you compiled that figure of 200,000 you added the large figure, the original amounts that you sold him, isn't that correct, that you sent?

A Well, all of the shares that were sent to him were compiled --

Q In that figure.

A -- in that 200,000 figure.

THE COURT: 261,000?

THE WITNESS: Yes, sir.

THE COURT: And of those eighty or ninety thousand were sold?

MR. LOWE: I believe his testimony was that eighty or ninety thousand were returned to him.

THE COURT: Returned to you?

THE WITNESS: Yes, sir.

Q In other words, an example of the 8200 of Calvin's stock which had not been sold -- do you follow me so far?

A I don't know whether they were sold.

Q Well, so far as your records were concerned, they were not sold; nevertheless eighty or ninety thousand shares of Franklin were returned to you?

A No.

Q Well, let us take it this way, with Calvin your records indicate that there were 50,000 shares sent to John Maher?

A Of which he retained 8200 shares.

Q Correct. So to put it another way around, 42,000 shares or thereabouts had been sold and you received the proceeds; correct?

A Yes.

Q Now in addition to receiving proceeds for stocks that had been sold you also eventually received back from John Maher actual shares of stock, namely, about eighty or ninety thousand, is that right?

A I think you are confused.

Q Well, that is what I thought had been represented.

THE COURT: No.

Q Let me ask it this way: had shares of Franklin stock been returned to you?

A Not out of this group. That's what I am trying to explain to you, sir.

Q Did you have any way of distinguishing what

group -- okay, I will withdraw that. Not out of Calvin's group?

A Not Calvin's or Patterson's or Federal.

THE COURT: Not out of these?

THE WITNESS: Not out of this stuff.

Q Are we finished with Calvin, that there were 8200 outstanding at the end of the time period reflected in your ledger?

A Uh huh.

Q Now, Mr. Patterson you had indicated there was a certain amount outstanding, and you had asked for an accounting of that. Which is the other account?

A There were three accounts.

Q What was the third one?

A Federal Acceptance Company.

Q And what was the total amount of shares not accounted for by John Maher, according to your records?

A It would be easier if I could look at a synopsis and tell you --

Q Well, I am asking you to take a look at the actual book.

A (After examining) Okay. Do you want me to add it up?

There is 11,960 shares. That is approximately

twelve, plus 6500, is 18,500; plus approximately 5500 would be 24,000 -- 25,300, approximately, total.

Q What does this indicate where you put down "Received" a certain amount of money?

A This is what I received from Mr. Rosenberg for a stock sale.

Q This is the total amount of shares sent to you?

A No, no.

Q Excuse me. These are the total amount of shares you sent to him under this account?

A Yes -- no, no. There is an additional 21 times 100 -- what would that be?

THE COURT: 2100.

A (Continuing) 2100, and one times 50, so it would be 2150 sent in that account.

Q Plus certain stocks were sold.

A Yes.

Q Now you have a figure here which reflects the amount that was sold from there?

A 6700 shares.

Q So, in other words, you have to subtract the 6700 shares from that amount.

A Yes, sir.

Q And in coming up with the compilation that you

did of the 200-and-some-odd thousand, am I correct in saying that you did not subtract from that amount the 6700 shares here?

A You are not correct --

Q Let me ask you here --

A Wait a minute --

Q Let me ask you the question, okay?

A All right.

Q You had an account such as Calvin. Let us go back to Calvin's account.

A Wouldn't it be easier for you, sir, if I tried to explain the separate transaction?

Q Well, I want you to go to your records that you used to come up with that figure -- all right?

A Okay.

Q Fine. Now will you go to Mr. Calvin's account?

A Yes.

Q In Mr. Calvin's account your records indicate there was a total, I believe, of 47,000 shares sent to John Maher; is that correct?

A No, we show 50,000.

Q All right, 50,000; in addition to which your records show that there were about 8200 shares left unaccounted for.

A That is correct.

Q When you compiled the 200,000 figure, what I am asking you --

A No, that would be the gross.

Q That is what I am asking you. When you added in the 50,000 you did not deduct the 43,000, approximately, from that.

A That is correct.

Q So that figure that the U.S. Attorney introduced in evidence is not an accurate reflection of the amount of shares that were still outstanding and unaccounted for by your records but rather --

MR. LOWE: We never claimed it was.

Q -- but rather, it merely reflects the total amount of shares that you went to John Maher over a period of time; is that correct?

A Actually, it doesn't reflect that either, because there were additional shares sent to him.

Q Now, are those the three accounts in this ledger?

A Yes, sir.

MR. AIDALA: May I have one moment, your Honor?

THE COURT: Yes.

(Mr. Aidala confers with Mr. Berger off the record.)

Q Is it not correct, Mr. Sunshine, that you do not

know of your own knowledge how many shares of Franklin Properties stock that you had sent to John Maher still remained in John Maher's name as of May of 1975?

A That is correct. That is why I asked for an accounting.

Q By the way, did the U.S. Attorney or anyone in his office show you certain records of John Maher relating to Franklin Properties stock?

A Not that I can recall, no,sir.

Q Well --

A Except perhaps in checks.

Q Isn't it so, when you testified on direct examination that your testimony was to the effect that the 200-plus thousand figure you came up with was a figure which you reflected by what was contained in that ledger in front of you?

A I don't think I testified to that exactly, no. My testimony, sir, was that based upon this ledger this was the figure that I came up with.

Q In other words, if we were to add up the three totals, gross of the three accounts that you referred to in that, we would come up with 260,000, is that correct -- yes or no?

A My answers to you were that there were two separate

matters -- this which involved the three accounts plus 100,000 shares sent to him, plus 40,000 shares sent to him, and an additional, I believe, 16,000 shares sent to him, and an additional 5000 shares sent to him that are not reflected in these three accounts.

Q May I have the receipts for those, please? Do you have them with you or did you give them to the United States Attorney's office?

A The receipts for the stock sent?

Q I want to see something that reflects that you sent that amount to them.

A I don't think I ever received receipts from Mr. Rosenberg. That's why I asked for the accounting. It was the 100,000 shares; that was when he sent the 80-odd shares back to me.

Q You keep pulling out that piece of paper --

A You asked me to see if I have something.

Q Is this a piece of paper you have recently made up?

A No, sir.

Q How long ago did you make that up?

A Do you want me to look at it?

Q Do you need to refresh your recollection as to when you made that up?

A Yes, sir.

Q Go ahead?

(Pause.)

A This was a copy of a letter which I went -- I ask you not to read it.

A You want to know the date of this?

Q Does that refresh your recollection as to when you made that item up?

A Yes.

Q What is your answer now?

A January 20, 1975.

Q You said you sent certain stock and received back about 80 to 90 thousand shares, is that correct?

A Yes, sir.

Q Is it not a fact that in compiling that 200-plus figure you added in the total of 100,000 shares of stock you say you sent?

A That's right.

Q You didn't subtract the 80 or 90 thousand shares?

A I was not asked.

Q Did you understand the purpose of the United States attorney in asking you to come up with that figure?

A I don't understand the purposes of the United States attorney in connection with most anything, truthfully.

My answer to that is no, I did not.

Q I believe you testified that even as to that 100,000 shares, that you came up with that figure based upon your memory, is that correct?

A Yes, plus these documents that I have here, plus when I made up this calculation in January of '75, referring to documents in my office.

Q By the way, when you would send the shares to John Maher, would you send a covering letter to them?

A Not necessarily.

Q Did you on any occasions?

A I don't recall that I did. I might have directed the transfer agent to send it and then he would have a memorandum forwarding the stock.

Q Is it not a fact that the Securities and Exchange Commission subpoenaed your record out in Denver, Colorado?

A Yes, sir.

Q Would any of those letters indicating certain amounts that were sent to John Maher be contained within those records?

A They subpoenaed the transfer agent's records, yes. Whether they would be a part of that, I don't know.

Q Have you ever been shown any by the United States Attorney's office?

A No, sir.

Q By the way, are you in the same office as that transfer agent?

A We share a suite.

Q Who owns that office?

A Gerritt Bromfield Company, a real estate company.

Q Really, doesn't the transfer agent work for you, Mr. Sunshine?

A No, sir.

Q Wouldn't the records of the transfer agent indicate the net number of shares you sent through to the transfer agent?

A It would probably represent the shares that he sent but it would not represent the shares that I sent directly.

Q Do you know what the expression "free-trading stock" is?

A Yes.

Q Is there a distinction made between free-trading stock and restricted stock?

A Certainly.

Q Would you be kind enough in a brief manner to inform the jurors as to the distinction between free-trading stock and restricted stock?

A You want me to act as an expert on this? I'm not.

Q Would you tell them what you believe and understand the distinction is?

MR. LOWE: I object.

THE COURT: Sustained.

Q How long have you been in the securities field in any capacity, Mr. Sunshine?

THE COURT: Do you consider yourself an expert?

THE WITNESS: No.

THE COURT: You don't feel you have the knowledge and expertise to explain these matters, is that correct?

THE WITNESS: I can tell you what my understanding is --

THE COURT: You don't believe you have the expertise?

THE WITNESS: No.

Q Tell the jurors where you obtained the stock you sent to John Maher.

A From various sources, much of which I had purchased, much of which were in my possession for friends of mine, that sort of thing. It was over a period of years.

Q By May of 1975, is it not a fact that you had exhausted whatever supply you had of Franklin free-trading stock?

MR. LOWE: I'll object on the grounds he has to conclude that.

THE COURT: Yes.

As of the end of May of 1975 did you own any shares of Franklin Properties?

Q Did you?

A Yes.

Q Was that free-trading or restricted stock?

MR. LOWE: He doesn't know, your Honor.

THE COURT: He may not be able to describe that.

A I really can't say.

THE COURT: He does not know.

Q Do you believe that you have an understanding of what is meant by the term "free-trading" asopposed to restricted stock?

A I believe I have an understanding.

Q Would you tell the jurors your understanding?

MR. LOWE: Objection.

THE COURT: Sustained.

Q If you had sent Mr. Rosenberg restricted stock, would he have been able to sell it?

MR. LOWE: Objection.

THE COURT: Sustained.

Q Did the United States attorney ever ask you whether any of those 200-plus shares you sent to Mr. Rosenberg included amongst them restricted stock?

A No, sir.

Q Did any of them include restricted stock?

MR. LOWE: Objection.

THE COURT: Sustained.

Q Do you know whether they included restricted stock amongst the 200-and-some-odd shares that were sent?

A No, I don't know.

Q If they did include restricted stock he could not have sold them, isn't that correct?

MR. LOWE: Objection.

THE COURT: Sustained.

Q Did you believe at that time, Mr. Sunshine, that if you had sent him restricted stock he could not

sell it to the public?

MR. LOWE: Objection.

THE COURT: Sustained.

Q Is it not a fact that some of the stock that you sent to John Maher was to be used for acquisitions and mergers with other companies?

A No, sir.

Q Can restricted stock be used for that purpose?

MR. LOWE: Objection.

THE COURT: Sustained.

Q Did you receive any reports for any of the proceeds that John Maher, Mr. Rosenberg, received for selling any of your shares?

A The normal slip that is sent from Maher for sales, yes. That's what is reflected here (indicating).

THE COURT: That's what your accounting shows?

THE WITNESS: Yes.

Q Is it not a fact that by your calculations that we just went through, plus your testimony about the return of the 80 to 90 thousand shares of stock, that in May of 1975, according to your own records,

John Maher did not have anywhere near 200,000 shares that you had sent?

A That's not correct.

THE COURT: Can you ascertain from the shares you started with, the shares that were sold, the shares that were returned to you as of the end of May, how many shares of stock of Franklin Properties were in the hands of John Maher Associates or Mr. Rosenberg?

THE WITNESS: May I answer your question in this manner, sir: The 80 to 90-some-odd thousand shares that were returned were returned after May of 1975.

THE COURT: How much after that?

THE WITNESS: That would have been in the fall.

THE COURT: As of May of 1975 how many shares --

THE WITNESS: There would have still been not accounted for somewhere in the neighborhood of about 180,000 shares.

Q That's an estimate on your part, is that correct?

A I don't think it's an estimate. It is

based on my records and recollection.

THE COURT: Give or take a few thousand?

THE WITNESS: Yes.

THE COURT: If you had a pad you would come out with the exact number; but that's the approximate number?

THE WITNESS: Yes.

Q According to what you just said, as of the fall of 1975 John Maher had far less Franklin Properties shares than they had as of May of '75, is that correct?

THE COURT: You can't tell what happened with their shares between May of '75 and the fall of '75?

THE WITNESS: I can't.

Q You know they returned to you about 80 or 90 thousand?

A Certainly. I have testified to that.

Q What I'm saying: based on your figures, they indicate that as of the fall of 1975 the shares that you had sent of Franklin to them, they had approximately 80 or 90 thousand less than what they had in May of '75?

A I would say that would be correct.

Q In other words, as of the fall of 1975 they

were not accumulating more Franklin shares. They were divesting themselves of Franklin shares that you were aware of?

A I don't know what in the heck he was doing.

Q Mr. Sunshine, how many nights have you spent in the United States Attorney's office since you came in from Denver?

A I spend my nights at the Plaza Hotel.

THE COURT: When did you come in?

THE WITNESS: Actually I came in on Sunday.

THE COURT: What time did you arrive on Sunday?

THE WITNESS: 5-something, New York time.

THE COURT: 5 p.m., New York time?

THE WITNESS: Yes.

THE COURT: You went to the Plaza Hotel?

THE WITNESS: Yes, sir.

THE COURT: Today is Monday.

Q I used the term "nights" --

MR. LOWE: So the record does not get confused, he's not referring to yesterday.

THE WITNESS: I mean a week ago Sunday.

THE COURT: How much time have you

spent in the United States Attorney's since then?

THE WITNESS: My first meeting there was on that following Tuesday.

THE COURT: How long were you there?

THE WITNESS: Approximately two hours.

THE COURT: When next did you see him?

THE WITNESS: Wednesday.

THE COURT: For how long?

THE WITNESS: Approximately two hours. Thursday, for approximately two hours.

THE COURT: Anything else?

THE WITNESS: I arrived late on Friday morning and I was there prior to coming over here. I did not meet with him.

And then this morning for a very brief period of time.

Q Is it not a fact that you have a certain application pending in Colorado?

A Yes.

Q Is that an application to be reinstated as an attorney?

A Yes.

Q At the present time are you a disbarred attorney?

A I am suspended and not disbarred. There is a distinction.

Q How long have you been suspended?

A Since, I believe, 1963.

Q Is it not a fact that any wrongdoing on your part would affect the possible success of your being reinstated as an attorney?

A Not in any way at all. All of the testimony with reference to that has been taken.

Q If the United States Attorney's office were to inform the persons in Colorado who are to rule on your application to be reinstated about some improper conduct on your part, would that not, in your opinion, have some bearing on whether you would be reinstated?

A Not at all. Not at this date.

Q Is it your testimony that if the United States Attorney's office or any other governmental agency informed the persons who would rule on your reinstatement that you had in their opinion committed a crime, that would not have any bearing on your being reinstated?

A No, sir. Not at all.

I'm trying to tell you all of the testimony has been taken.

Q You have not been reinstated as of yet, have you?

A No, sir.

THE COURT: The hearing is closed.

THE WITNESS: Yes, sir.

Q A hearing can always be reopened for good cause?

A You can answer that better than I can.

Q The answer is yes?

A I don't know.

Q You are very desirous of being reinstated, is that not correct?

A Most certainly.

Q You would not want anything to affect your possibility of being reinstated, would you?

(Pause.)

Q Would you?

A I am trying to think about the question. It's kind of an asinine question, in my opinion.

I am desirous of being reinstated. I certainly would prefer that nothing would take place. But by the same token I would not do anything to become involved in anything that would affect it.

Q Isn't it a fact that the United States

Attorney's office point[illegible] out to you that they believed you were using nominee accounts in Denver, Colorado?

A They didn't have to point that out. I knew that.

Q They disclosed to you they were aware of what you had been doing?

A Yes, sir.

Q Did you report all of the income that you received from John Maher on your income tax?

A I most certainly did.

Q Did you also report on your income tax all the payments that John Maher received for sale?

A I reported the net income to me.

Q How long a period of time did the United States Attorney's office keep you in the office at any one time?

A I say about two hours at a time, but most of that was spent in my sitting and waiting, actually.

Q Were there any pressures brought to bear on you during any time you were there?

A To do what?

Q To speak to them initially.

A No. I was under subpoena.

Q Were you under subpoena to appear in this

courtroom?

A Yes, sir.

Q You were no[t] under subpoena to speak to the United States attorney, were you?

A Have it as you will.

Q Am I correct?

A I don't recall what the subpoena said, frankly. It was a subpoena duces tecum to bring my records. I spoke with you and I was not under any subpoena.

Q You were under something else at the time, were you not?

Were you in the same condition when you spoke to the United States Attorney's office as you were when you spoke to me?

A Certainly.

Q You were drunk?

A I was not. I just didn't like your moustache.

Q You don't like people in the Eastern part of the United States either, isn't that a fact?

A That's not true.

Q Isn't it a fact that Franklin Properties were going to move their main offices and you were

going to be out, they were moving them here to the East Coast?

A I was instrumental in having it done.

Q Isn't it a fact you said you had not been successful in making any acquisitions or doing anything to benefit the company?

A Not for a long period of time.

Q Is it your testimony under oath you were not drunk when you saw me the other night?

A I certainly do testify that to be a fact.

Q Before you came to see me had you been drinking alcohol?

A No, sir.

Q Had you been drinking vodka?

A No, sir. Not before.

Q Had you been drinking vodka out of a water glass and drinking it like water without any ice, without anything, to cut it down?

A When? In your office?

Q Before you got to my office.

A No, sir.

Q Did you have about a half gallon of vodka in your hotel room?

A Certainly. We keep it there all the

time.

Q Did you have anything to drink this morning before coming to court?

A No, sir.

Q Did you have anything to drink last night?

A I think so.

C Isn't it a fact that you had to be put in a cab and brought back to the hotel because you were in such an inebriated condition?

A That is not true.

THE COURT: Members of the jury, I will tell you again what I told you at the commencement of this trial. When questions are asked, just by the mere asking of the questions you are not to infer the opposite by reason of answers given. Nor is the tone of voice of the questioner in any way to reflect upon the validity of the question or the answer.

Q You have testified as to the ledger you have before you. You testified based on your memory and some notations you say you made concerning other shares of stock. Is it not a fact that if you could not account for shares of Franklin Properties that you then could have a problem with the Internal Revenue Service?

A I can't see how.

Q If in fact it turned out that you had assets which you didn't declare on your income tax, do you envision any possibility of having any difficulty with the income tax --

MR. LOWE: I'll object generally. Assets are not reported anyway.

THE COURT: Sustained.

Q If you failed to declare certain assets on your income tax, is it your belief that that could cause you a problem with the Internal Revenue Service?

A If it was income to me, certainly I would assume so.

Q If youi deducted shares which you said were sent to John Maher and in fact they had not been sent to John Maher, would that not be an improper deduction?

A I would assume so but that was not the case.

Q You testified it was not the case?

MR. LOWE: Mr. Aidala doesn't testify to anything.

THE COURT: Very well.

Proceed.

Q Do you know when a final decision is going to come down on your being reinstated?

A No, sir. I don't know.

Q Mr. Sunshine, you testified on your direct testimony that as to three accounts in the ledger in front of you, those three accounts were nominee accounts, isn't that correct?

A Yes, sir.

Q You emphasized on direct examination that they were nominees "for me," isn't that correct?

A Yes, sir. Except I will say this, I do --

Q Just answer my questions.

THE COURT: No, no. I'll permit him to answer.

Have you finished your answer?

THE WITNESS: I believe that Mr. Patterson did receive some of the proceeds.

Q You testified that the nominees were yours and not for anyone else, isn't that correct?

A Yes, sir.

T7

Q And isn't it a fact that the reason -- one of the prime reasons why you used nominee accounts is so that there would be no record which would reflect income to you?

A No, sir.

Q Well, is it not a fact --

A I testified that I reported all of the income received.

Q Is it not a fact that any record that you kept would show that Mr. Patterson or Mr. Calvin received the moneys, isn't that correct?

A Certainly. That is what is reflected here.

Q It doesn't reflect that Robert Sunshine received the money, does it?

A No, this is my ledger, though.

MR. AIDALA: I have no further questions.

THE COURT: Mr. Lowe.

REDIRECT EXAMINATION

BY MR. LOWE:

Q Mr. Sunshine, the entries in those books relating to sales and proceeds of sales, how did you obtain that information?

A From little yellow slips forwarded to me from Maher.

Q And how about from that yellow piece of paper that we put in evidence before?

MR. LOWE: Do you have that?

(Mr. Aidala hands to Mr. Lowe.)

Q Government's Exhibit 13-C (handing).

A (After examining) No, sir. This was sent to me long afterwards. These were from the slips, the confirmations or whatever sent to me by Maher. This was sent to me by Rosenberg in response to a request for an account.

Q Do you have any personal knowledge as to whether any of the information you received from Mr. Maher -- excuse me, from John Maher Associates or from Mr. Rosenberg is accurate?

A No, sir, I do not have any information.

Q Have you reviewed the books of John Maher Associates to determine the accuracy of any reports that you received?

A No, sir.

MR. LOWE: May we have this marked as Government's Exhibit 13-D, please -- for identification.

xx (Document marked Government's Exhibit 13-D for identification.)

BY MR. LOWE:

Q Directing your attention to Government's

Exhibit 13-D for identification (handing), are those copies communications you sent to Mr. Rosenberg?

A Yes.

Q And were they sent at or about the dates reflected on the documents?

A Yes.

MR. LOWE: The government offers Exhibit 13-D in evidence (handing).

MR. AIDALA: Judge, is this being offered for the truth of what is in it or merely to show that it was sent?

MR. LOWE: Well, for the moment we will just offer it to show that it was sent.

MR. AIDALA: If that is the only purpose, Judge, that he says it was sent, I have no objection.

THE COURT: All right, received in evidence.

xx (Government's Exhibit 13-D received in evidence.)

BY MR. LOWE:

Q Mr. Sunshine, after you sent those communications to Mr. Rosenberg did he communicate with you in any way to tell you anything that you wrote in there was inaccurate?

MR. AIDALA: Objection.

THE COURT: Did you have any further communication with Mr. Rosenberg with respect to those communications?

(Witness examines.)

THE COURT: Did you have any response from him?

THE WITNESS: Yes, sir.

Q What was the response?

A We discussed on many occasions that he would furnish me an accounting.

Q Did he ultimately?

A Ultimately the yellow sheet.

Q What did Mr. Rosenberg tell you, if anything, that this yellow sheet represented (handing)?

A He told me that this represented the sales of stock which I had sent to him in the Calvin and the Patterson account.

Q How about the Federal account?

A That is not on this sheet.

Q Directing your attention to the entries on the second column --

A (After examining) Oh, I am sorry, yes, excuse me, there are entries concerning a D. Klausner, and there are three entries as to the Federal account -- I am sorry.

Q And Mr. Rosenberg told you that that was an accounting of the sales of the stock that you had sent to

him for those accounts?

A Yes.

Q Mr. Sunshine, you were asked on your cross-examination about the fact that you had an application pending regarding your readmission to the Bar in the State of Colorado?

A Yes, sir.

Q And that relates to your readmission to the right to practice law in that State, is that right?

A That is correct.

Q And you said there was a hearing at which evidence was taken about that.

A Yes, sir.

Q When did that hearing take place?

A I believe the latter part of June, last year.

Q And did persons come and testify in your behalf?

A Yes, sir.

Q And were you present when they came and so testified?

A Yes, sir.

MR. AIDALA: I am going to object to a --

THE COURT: No, I will permit it.

MR. AIDALA: I ask for proof.

THE COURT: No, I will permit it.

Q Did anyone in this courtroom come and testify on your behalf?

MR. AIDALA: Objection.

THE COURT: I will permit it.

MR. AIDALA: What is the materiality of that?

THE COURT: I will permit it.

A Yes, sir.

Q Who?

A Mr. Rosenberg.

Q And this was in June of 1975?

A The latter part.

MR. LOWE: I have no further questions.

RECROSS EXAMINATION

BY MR. BERGER:

Q Mr. Sunshine, my name is Mr. Berger, and I represent Mr.Rodman.

Do you know Mr.Rodman?

A No, sir.

Q You testified with regard to three nominee accounts, is that correct?

A Yes, sir.

Q And those accounts were set up when -- in 1974?

A I believe that is right, sir.

Q And in 1974 were you committed to trade the stock

of Franklin Properties?

A Me personally?

Q Yes, you personally.

A It was my opinion that I was, yes.

Q And you felt that you were under no prohibition against trading that stock?

A Not at that time.

Q And instead of trading that stock in your name you chose to trade it in nominee names, is that correct?

A Yes.

Q Will you please tell the Court and jury why you chose to trade that stock in nominee names rather than in your own name?

A It was merely a convenience, really.

Q Well, what kind of convenience was it, Mr. Sunshine?

A Well, frankly, I have a lot of creditors, and if it would have been in my name, why, it might have been subject to attachment.

Q So that in effect you were trying to hide your ownership of that stock against some legal claim that might be made against you, is that correct?

A I wasn't trying to hide it; I was simply trying to avoid having it discovered.

Q Isn't that the same as trying to hide it?

A If you say so, sir.

Q And isn't it a fact that you can use nominee accounts for the same purpose of hiding income, is that correct?

A I wouldn't know about that. I don't believe so.

Q Well, so far as convenience, isn't it really inconvenient to use a nominee account?

A No. In my opinion there is a distinction. You see, I paid off my creditors and have been for a number of years when I became involved financially, as I feel they should be paid off, and I paid them off on a monthly basis. I feel that some of them should receive priority and others necessarily should not, and I wanted to continue that priority of payment so that the people who were in need of moneys that I owed would get that first and the others would come in afterwards.

Q And you felt that was a decision you should make rather than the judicial system, meaning the courts?

A Well, it would mean going into bankruptcy and I did not want to do that.

Q Well, if a creditor had a judgment against you and he had the first judgment against you, then as an attorney you know that that creditor would have priority

against your assets, would you not?

A Not necessarily in Colorado.

Q If he had a judgment against you he could attach your assets --

A Uh huh.

Q -- is that correct?

A He could, yes. He could execute on his judgment, but in Colorado another creditor without a judgment could issue an attachment proceeding prior to obtaining a judgment, so he would have the same priority, in effect.

Q Except that he would have to put up a very substantial bond for the amount of his suit that he was attempting to attach prior to judgment?

A Not necessarily.

Q You mean in the State of Colorado you can attach prior to -- at the same time as bringing an action, without a bond?

A Real estate can be used for that sort of thing, but a bond would have to be put up, yes, but not in that amount.

MR. LOWE: I do not see that any of this goes to the redirect.

THE COURT: Overruled.

Q Mr. Sunshine, you say that you gave this ledger,

which has been marked Government's Exhibit 17, to Mr. Lowe, is that correct?

MR. LOWE: 13, please.

Q Is ir 13? Yes, Government's Exhibit 13. Did you show that to Mr. Lowe?

A It came by air from my office, and it was picked up by someone and it went to Mr. Lowe's office.

Q And when did you for the first time seek to have that ledger brought into New York?

A Either Wednesday or Thursday of last week, I believe, something like that.

Q Was that after you had seen Mr. Lowe?

A Yes.

Q Now, you had testified that you received a subpoena duces tecum, did you not?

A Yes.

Q That subpoena told you to bring your records, did it not?

A Yes.

Q Why didn't you bring the ledger with you?

A I neglected to, sir.

Q Isn't it a fact, Mr. Sunshine, that it was not until after Mr. Lowe showed you a number of checks with nominee names that you told Mr. Lowe about the ledger?

A No, sir.

Q Are you sure of that?

A I am quite positive. The checks were shown to me after that.

Q When was the first time you went to see Mr. Lowe?

A Last Tuesday.

Q And on last Tuesday did Mr. Lowe show you any checks?

A I don't recall his showing me any checks at that time.

Q When was the first time that he showed you any checks?

A I believe it is -- my recollection is Thursday, perhaps Wednesday.

Q And what day did you call to have the ledger book brought in?

A It was prior to my seeing the checks -- whether it was Tuesday or Wednesday.

Q Now isn't it a fact that if Mr.Rosenberg had not received certain moneys you claimed he received you would have underestimated your income on your '74 tax return?

A Well, that doesn't happen to be the truth.

Q But isn't that a fact?

A No, sir.

Q And in 1975 if Mr. Rosenberg did not in fact receive money you claimed he received, you would have understated your income for the year 1975, isn't that correct?

A The same answer.

Q You were dealing in cash with Mr. Rosenberg, is that correct?

A No, sir.

Q Did you ever receive any cash from Mr. Rosenberg?

A No, sir.

Q Did you ever give any cash to Mr.Rosenberg?

A No, sir.

Q Do you have your checks with you which would show that you gave Mr. Rosenberg checks?

A No, sir.

Q Were you asked in your subpoena duces tecum to bring checks with you?

A No, sir.

Q Were you asked in your subpoena duces tecum to bring records with you?

A Yes, sir.

Q As an attorney are your checks records?

A Sir?

Q As an attorney would you say that your checks

are records?

A Yes, sir, but they were not in my possession.

Q Was the ledger in your possession?

A Yes, sir.

Q Did Mr. Lowe ask you whether you paid Mr. Rosenberg with checks?

A Yes.

Q Did he ask you to produce those checks?

A No, sir.

MR. BERGER: I have no further questions.

THE COURT: Anything further, Mr. Aidala?

MR. AIDALA: No further questions, your Honor.

REDIRECT EXAMINATION

BY MR. LOWE:

Q Mr. Sunshine, you first came to my office on Tuesday of last week, isn't that right?

A Yes, sir.

Q In the evening?

A Yes, sir.

Q Prior to that time had you met with anyone else involved in this case?

MR. AIDALA: Improper redirect, your Honor.

THE COURT: No, I will permit it.

A Yes, sir.

Q Who?

A With Mr. Rosenbergand this gentleman with the mustache.

Q Tuesday of this past week was that the first time that you had ever seen me?

A That is correct.

Q And during our meeting on Tuesday I asked you certain questions and you gave me certain answers, is that right?

A Yes, sir.

Q And the next time we met was when?

A It would have been Wednesday night.

Q And Wednesday night you saw some checks, did you not?

A I believe it was Wednesday night, yes, for the first time.

Q And those checks were the checks that were shown to you here in the courtroom today, were they not?

A Yes, sir.

Q Had you volunteered any information prior to that time?

A No, sir.

Q And isn't it a fact that it was pried out of you?

A I think that would be an understatement.

Q And it wasn't your income taxes that you had anything to be concerned about with regard to the moneys that you received,was it?

A Not in any manner or form.

Q It was the Securities laws, was it not?

A Yes, sir.

Q As a matter of fact, you were one of the operating directors of Franklin Properties, were you not?

A No t a director at the time, but I was in a -- well, prior to the '74 period I was --

Q Running the company right?

A I would say so, yes.

Q That makes you a person in control, does it not?

A Two, yes.

Q And there are some laws which prohibit sales of the stock of the company by persons in control without filing certain documents about those sales, isn't that correct?

A That's my understanding.

Q Not your income tax but that was one of the primary reasons for the use of nominees, wasn't it?

A Well, in effect, but may I explain. I had divested myself of control prior to the time that these transactions with Mr. Rosenberg started taking place. This New York group that was mentioned had come into control and I was no longer a controlling factor.

Q Who was the New York group?

A Primarily a Mr. Bradspies.

Q Who else?

A There was a gentleman from Boston, and a gentleman from Los Angeles.

Q Who is the gentleman from Boston?

MR. AIDALA: I think this is going a little far afield.

THE COURT: I'll permit it.

A For the life of me, I don't recall his name.

Q What, if any,relationship did either Mr. Bradpies or the gentleman from Boston have to Mr. Rosenberg?

MR. AIDALA: I object to that.

THE COURT: I'll permit it.

A The gentleman from Boston was Mr. Rosenberg's son-in-law, I believe.

Q And Mr. Bradspies?

A An attorney.

Q How did Mr. Bradspies get involved, to begin with?

A Perhaps six or eight months prior to the time they took over management of the company, Mr. Rosenberg referred Mr. Bradspies to me and me to Mr. Bradspies in connection with a company called the Southern Vermont Land Company. It was a privately-owned corporation engaged in the real estate business which wanted to merge with a public company with a substantial tax loss carry-forward for the purpose of tax

benefits. That's how I became involved and that's how Franklin became involved with Mr. Bradspies.

MR. LOWE: I have no further questions.

THE COURT: Anything further.

RECROSS EXAMINATION

BY MR. AIDALA:

Q Do you know whether the government is going to inform the authorities in Colorado as to any violations of the securities laws you have admitted to?

A I have no idea.

Q You hope they don't?

A I don't think I have committed any violations.

MR. AIDALA: Nothing further.

THE COURT: You may step down.

(Witness excused.)

MR. LOWE: At this time I wish to offer a series of documents.

Government's Exhibit 1, the record of the Holiday Inn.

MR. BERGER: No objection.

MR. AIDALA: No objection.

(Government's Exhibit 1 was received in evidence.)

MR. LOWE: Government's Exhibit 2A, record

pga4

of toll calls from the firm of John Maher Associates.

MR. BERGER: No objection.

MR. AIDALA: No objection.

THE COURT: Received in evidence.

(Government's Exhibit 2A was received in evidence.)

MR. LOWE: Government's Exhibits 2C and 2E, reflecting the telephone number of Mr. Rodman's home and the phone numbers assigned to John Maher Associates.

MR. BERGER: No objection.

MR. AIDALA: No objection.

(Gvoernment's Exhibits 2E and 2C were received in evidence.)

MR. LOWE: 7, 7A and 7B, being Xerox pages from the ledger books of John Maher Associates.

MR. BERGER: No objection other than --

MR. AIDALA: There was testimony on this.

THE COURT: Is there any objection?

MR. AIDALA: As for these, relevancy.

THE COURT: Overruled.

(Government's Exhibits 7, 7A and 7B were received in evidence.)

THE COURT: That's the sole basis of the

pga5

objection, relevancy?

MR. AIDALA: Yes, and prejudicial -- everything that the law permits.

THE COURT: I won't take it that way. It's only as to relevancy?

MR. AIDALA: It's relevancy and prejudicial.

THE COURT: Overruled.

MR. LOWE: Government's Exhibits 8, 8A and 8B, checks issued by Calvin on John Maher Associates.

MR. BERGER: No objection.

MR. AIDALA: No objections.

(Government's Exhibits 8, 8A and 8B were received in evidence.)

xx MR. LOWE: 9, 9A and 9B.

MR. BERGER: No objection.

MR. AIDALA: No objection.

(Government's Exhibits 9, 9A and 9B were received in evidence.)

xx MR. LOWE: Government's Exhibit 11 for identification, being checks issued to Michael Scott on the John Maher Associates account as to which there has been a stipulation that if called to the stand to testify Mr. Marcus would testify --

pga6

THE COURT: He was the check casher.

MR. LOWE: -- that he cashed both of these checks and gave the proceeds thereof to Mr. Rosenberg.

(Government's Exhibit 11 was received in evidence.)

MR. LOWE: Finally, Government's Exhibit 12, the bank account statement.

THE COURT: Of what?

MR. LOWE: Mr. Rosenberg.

MR. AIDALA: Exhibits 7 through 12 we object to on the grounds of relevancy, prejudicial, and the fact it is such a period of time which is beyond the date on this indictment.

MR. BERGER: The defendant Rodman adopts that.

THE COURT: Overruled.

MR. BERGER: I would like a description of what Government's Exhibits 2C and 2E are again.

THE COURT: Rodman's home telephone number and the John Maher phone number.

MR. BERGER: I thought the phone bills were going to be put in.

MR. LOWE: From John Maher.

MR. BERGER: And what about Mr. Noonan?

MR. LOWE: Do you want them?

MR. BERGER: Yes, and his friend's home number..

MR. LOWE: Government's Exhibits 2 and 2B being records of the telephone company: 2 relates to Noonan's home phone and 2B relates to the telephone number which Noonan testified was the number of his friend.

(Government's Exhibits 2 and 2B were received in evidence.)

THE COURT: These are a lot of exhibits going in which you have not seen but, as counsel sees fit, they may be explained to you in one way or another. Any exhibit that's in evidence, when you deliberate, you may have those exhibits in your deliberation if you so desire.

THE COURT: Anything further?

MR. LOWE: May I have a moment. I have to check my list.

THE COURT: Yes.

(Pause.)

MR. LOWE: I neglected to offer Government's Exhibit 7C, being various new account data cards frm John Maher Associates.

MR. AIDALA: Same objection.

THE COURT: Same ruling.

Objection on relevancy?

MR. AIDALA: Relevancy, prejudicial, and no connection. They are sent out and somebody else fills them out.

THE COURT: Overruled.

(Government's Exhibit 7C was received in evidence.)

xx MR. LOWE: At this point the government rests, your Honor.

THE COURT: That means the government has completed the direct presentation of its case which means we can adjourn at this time for lonch. This is a good time. I will expect you back here at 2 o'clock. Don't discuss the case. Don't make up your minds about it. You have not heard all the testimony, nor have you heard the law.

Pleasant lunch. We'll see you back here at 2 o'clock.

(The jury left the courtroom.)

MR. LOWE: Your Honor, during the course of the trial we marked as exhibits and authenticated the books from which I introduced Xerox copies.

I more or less promised the firm of John Maher Associates that they could get those books back, which is why I admitted Xerox copies of the pages I deemed relevant.

To what extent, if any, does the defense require these original documents for their case at this point?

MR. AIDALA: I assume they will be here during the recess. We will discuss them and if we need them, we will have them.

THE COURT: Do you have a motion?

MR. BERGER: At this time I move that the case against Mr. Rodman be dismissed because the government has failed to prove as a matter of law beyond a reasonable doubt each and every element of the crime alleged.

THE COURT: I think this is a jury question to determine and accordingly your motion is denied with an exception.

MR. AIDALA: I move for a judgment of acquittal on the same grounds and I suppose, to save time, all the grounds that were mentioned during the lengthy arguments of the first trial, including the failure to establish that mailing was the necessary

and absolute requirement.

THE COURT: Your motion is denied with an exception. I believe there is a jury question as to the counts charged in this indictment.

Timewise, you have two young ladies to put on?

MR. BERGER: Yes.

THE COURT: That will take 10 minutes?

MR. BERGER: Yes, your Honor.

THE COURT: Mr. Aidala?

MR. AIDALA: I will be briefer than that.

THE COURT: You will be summing up this afternoon and we will charge the jury in the morning.

I have your request, Mr. Berger, on the use of the mail. Is that any different from what I gave before.

MR. BERGER: Yes.

THE COURT: In what respect?

MR. BERGER: Yes. The difference is that basically I leave out everything relating to the question of custom in the industry and I use the phrase, the second part, "intent to use the mail to effect a scheme to defraud may only be inferred if the

scheme could not be carried out without the use of the mail."

The balance of that paragraph is substantiated by the cases that I have cited. The instruction that was given in the last trial simply was that if the individual defendants contemplated the use of the mail, if they could have foreseen there would have been use of the mail because of their experience in the securities industry, then you can find that there has been use of the mail or that they intended to use the mail. I have hadded the words here "intended and agreed to" as set forth in the cases. I have also had the words --

THE COURT: I don't think that both defendants have to know that the mails were going to be used. I don't believe that's so.

MR. BERGER: The cases hold that where there has not been a substantive count, there must be an agreement to use the mail, and originally, your Honor, under the real old cases, going back to 1911, thosecases held that if there were not a mailing you could not have a conspiracy at all.

Then the courts went away from that to a certain point. Some jurisdictions still hold it,

but the Second Circuit has not strayed too far from the Farmer case, and all these cases hold that to infer intent without there having been a mailing, then use of the mails must be indispensible to effect the scheme, that there is a much greater burden in a conspiracy case to prove use of the mails or contemplate or intended use of the mails than in a case in which there are substantive counts where the mails have been used.

For example, there was a case in which the mails were used and they were used all over the country and the court held in this particular case it was not the use of the mails that the defendants were relying upon but the glib tongue of one of the defendants. I think that case has gone a bit too far but these cases that I have set forth in a nutshell take the law from all of the jurisdictions and that law is set forth, I believe, properly in my request.

I have not gone as far as the Second Circuit has held in the Farmer case. I have not gone that far. Where there has been no mailing, there is this very heavy burden on the part of the government to show that use of the mails was an integral part of the scheme.

THE COURT: Are you arguing that both defendants have to know that the mails are going to be used?

MR. BERGER: Yes.

THE COURT: I don't think so.

MR. BERGER: The cases so hold.

THE COURT: I have not completely digested it because I was reading the slip opinions but there was one, the Dixon case, that was handed down on the 12th, which is a combined securities and mail fraud.

MR. BERGER: There was a substantive count. That's the difference.

THE COURT: I don't know. I am not satisfied yet that I understand the case completely yet. It's an excellent opinion from Judge Friendly. I'm not sure it goes that far. I'll look at it again during lunch.

I don't know what I'll do with this.

MR. BERGER: I have never ofund one case yet where there has not been in the mail fraud case One substantive count. This is the first time there has not been one substantive count.

MR. LOWE: This is the first time we e r caught anybody that fast.

MR. BERGER: I have not found such a case. These cases so hold. One case which I think is a pretty good example, there was a conspiracy to commit mail fraud, now the defendant withdrew prior to the mailing. They found his conviction to commit mail fraud was reversed. That's the Blue case, Blue vs. United States, a Sixth Circuit case. Here the mailing was aborted by the government. In the other case he withdrew before, but normally even if a defendant withdraws from a conspiracy, he may not be held accountable for certain things and he may be held accountable for others, but the court was clear in saying that although --

THE COURT: No crime was committed at the time he withdrew.

MR. BERGER: The overt acts were committed at the time he withdrew but the mailing did not take place.

THE COU RT: I'll take a look at it.

MR. AIDALA: Your Honor denied my request to state to the jury what had transpired between Mr. Noonan and Mr. Lowe --

THE COURT: If you look at the transcript it will indicate that I made a ruling in there.

MR. AIDALA: I am asking the United States attorney to have somebody else ready in the event I should decide to call him.

MR. BERGER: If that's done I want a severance.

THE COURT: I suggest you seriously consider what you are about to do.

MR. LOWE: I have a legal point I would to raise before summations and that relates to the following: During the course of the summations in the last trial Mr. Aidala made use of the claim that if it were impossible for something to be pre udicial in the end, then they had to find Mr. Rosenberg was not guilty because it was not possible, that is not the law.

I would like to have Mr. Aidala instructed that he cannot argue that to the jury because it is contrary to the actual law, that regardless of whether it was ultimately impossible --

THE COURT: My charge on conspiracy takes care of that.

MR. AIDALA: It has a direct bearing on intent and the state of mind of Mr. Rosenberg and that's the reason it was offered.

THE COURT: When it is raised and objected

to, I will tell them in my final charge that the object of the conspiracy was never accomplished but that is not a consideration --

MR. AIDALA: That was not the argument.

THE COURT: I'll wait until I hear the argument.

Court is adjourned.

(Luncheon recess.)

mkpl

AFTERNOON SESSION

2.00 P.M.

(The following occurred in the absence of the jury.)

THE COURT: All right, we are ready to go.

You won't object to the other two witnesses sitting in the back of the courtroom, Mr. Lowe?

MR.LOWE: I don't know whether their testimony is related or not. You mean related to each other?

THE COURT: And if it isn't, all the more reason --

MR. LOWE: If it isn't, then there is no problem, but if it is, maybe there is.

THE COURT: All right, I guess by the time we argue it -- all right, get the jury in the box.

(Jury in box.)

ELAINE WINTER, called as a witness by the defendant Rodman, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BERGER:

Q Mrs. Winter, by whom are you employed?

A Morton Berger.

Q Is that me?

A That's you.

Q And how long have you been employed by me?

A A year and a few months.

Q I draw your attention to a day in November, 1975. Did you receive a phone call or phone calls from an individual who identified himself as Ken Noonan?

A Yes.

Q And what did Mr.Noonan say to you when he called?

A He wanted to get in touch with Bill Rodman or yourself. He said it was very important that he speak with Mr.Rodman; he had information for him. He said it was urgent that he speak with him.

Q Was I in the office at that time?

A No.

Q Do you recall how many times or approximately how many times Mr. Noonan called?

A Two or three times.

Q And did he leave a message with me telling me that he called?

A Yes.

Q And on the following day did you say anything to me about those phone calls?

A Well, I asked whether or not you had called Mr. Noonan because it was so urgent, and I wanted to make sure

that you did receive the message.

Q And what did I tell you?

A You told me that you did, and that you gave him Mr. Rodman's number.

MR. BERGER: I have no further questions -- oh, excuse me.

Q Do you recall the date on which you received these phone calls from Mr. Noonan?

A Yes, it was November 20th.

Q And how do you arrive at that specific date?

A That was the day that you went to the basketball game.

Q Do you know which basketball game I went to?

A Fordham and Canadian Olympic.

Q And did you check that date, the date that the game took place?

A Yes, I verified it by calling up Madison Square Garden and they told me it was the dayof November 20th.

Q And are you sure in your mind that was the day that you received the call from Mr. Noonan?

A Yes.

MR. BERGER: I have no further questions.

THE COURT: Mr. Lowe?

CROSS EXAMINATION

BY MR. LOWE:

Q Mrs. Winter, did Mr. Berger go to that game alone or with someone else?

A I believe he went with a few gentlemen, yes.

Q Who did he go with?

A I know he went with Mr. Talcot because Mr. Talcot is coaching Fordham.

Q Did Mr. Rodman go with him?

A I believe so, but I am not sure of that.

MR. LOWE: No further questions.

THE COURT: All right, anything further?

(No response.)

THE COURT: All right, you may step down.

(Witness excused.)

THE COURT: Next witness.

ROSEMARY RODMAN, called as a witness by the defendant Rodman, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BERGER:

Q Mrs. Rodman, try to keep your voice up.

A I will.

Q Do you know the defendant Bill Rodman in this case?

A Yes, I do.

Q Is he your husband?

A Yes, he is.

Q How long have you been married to Mr. Rodman?

A It will be 13 years in May.

Q Are you presently residing with your husband?

A Yes.

Q Calling your attention to November of 1975, were you residing with your husband then?

A Yes, I was.

Q In November of 1975, did you have occasion to overhear a telephone conversation between your husband and one Ken Noonan?

A Yes, I did.

pga Rodman-direct

Q Tell the court and the jury --

THE COURT: Before we get to that, I have to find out how she knew.

Establish that, please. Had you ever talked to him before?

A I don't believe I ever spoke to Mr. Noonan before.

Q Mrs. Rodman, how did you know that the telephone conversation was between your husband and Mr. Noonan?

A Because he later told me so.

Q Who told you?

A Mr. Rodman.

(Continued on next page.)

MR. LOWE: I will object to that on the ground it is hearsay, your Honor.

Q When did he tell you?

A Immediately after the conversation.

THE COURT: I will sustain the objection.

Q Was there anything about that conversation that you ever heard that brought your specific attention to it?

A Yes.

MR. LOWE: I will object to anything about the conversation on the ground that it is all hearsay at this point and cannot be connected.

MR. BERGER: Your Honor, may I approach the bench?

THE COURT: Yes.

(At the side bar.)

MR. BERGER: This testimony is being offered for the state of mind of William Rodman and not necessarily for the truth of the matter asserted.

THE COURT: You can say what the conversation was on that end.

MR. LOWE: The conversation is irrelevant. She cannot testify what Mr. Rodman said to some person that she cannot establish was Noonan.

THE COURT: What do you expect to prove by that?

MR. BERGER: I expect to prove the conversation

took place on or about the end of November; that Rodman was calling the individual on the other side "Ken," and he didn't want to be involved in any stock deal, and that therefore he was very concerned when he hung up. She asked him, "What was the conversation about that?"

THE COURT: You don't do that --

MR. BERGER: I believe it is part of the res gestae, your Honor.

THE COURT: She could say he called him "Ken," and he didn't want to get involved in any stock deal, and that's all.

MR. BERGER: There was another phone call after that. The other phone call was between her and Noonan.

THE COURT: The trouble is establishing the fact that it was Ken Noonan.

MR. AIDALA: I remind the court that Pendrick testified he didn't know Ken before. He was just a guy that called up and didn't identify him.

MR. BERGER: I respectfully except on the basis of showing Mr. Rodman's state of mind.

THE COURT: No.

(In open court.)

BY MR. BERGER:

Q During this phone conversation, did you hear your

husband refer to the other person by name?

A Yes.

Q What name?

A Ken.

Q Just his first name?

A Yes.

Q Did you hear what he said to that party?

A I did.

Q What did your husband say to the party on the phone?

A Well --

Q Just the words he said. If you cannot remember the exact words just the substance.

A I heard my husband mention the word "stock." I heard him say that he has not been involved in stock for years and that he does not want to be involved.

Then I heard what sounded like someone listening and, you know, "Uh huh," and he said he didn't know of any name and he didn't want any part of it; and then he proceeded to begin talking about, that he had property, that he was in real estate and I was wondering at that time --

THE COURT: Just what you heard.

Q Did you hear that on the telephone?

A I heard that on the telephone.

Q What your husband was saying on the telephone?

A Exactly.

Q Was there any particular facial expression on your husband?

A He seemed very concerned or upset. He just seemed very nervous.

Q Did there come a time, December 1st, that you received a phone call from an individual who identified himself to you as Ken Noonan?

A Yes, I did.

Q How do you know the date of that phone call?

A Because it was the night my husband had left to go to Binghamton.

Q When you answered the phone, what did the individual on the other side say to you?

MR. LOWE: I will object to that.

THE COURT: Sustained.

You don't know a Ken Noonan?

THE WITNESS: Only from what I heard on the telephone.

THE COURT: You don't know Ken Noonan?

THE WITNESS: No.

THE COURT: You never talked to a person by the name of Ken Noonan?

THE WITNESS: Just from what the person said.

THE COURT: You have friends that call you up and say, "This is Mary," and you recognize their voice?

THE WITNESS: Yes.

THE COURT: This was a voice that was strange to you and you don't know who was on the other end of the phone?

THE WITNESS: Not until he told me.

THE COURT: And even then you didn't know whether it was he?

THE WITNESS: I guess that is correct.

THE COURT: I will sustain the objection.

MR. BERGER: I respectfully except.

BY MR. BERGER:

Q Thereafter what did you do?

A After I received the phone call?

Q What did you do thereafter?

A I called my husband later on and told him that I had given the telephone number to a person who identified himself as Ken Noonan.

Q What telephone number did you give him?

A The number up in Binghamton.

Q What did your husband say to you at that time?

MR. LOWE: Objection, your Honor.

THE COURT: Sustained.

Q What did you say to your husband about the fact that you gave his number in Binghamton to somebody who identified himself as Ken Noonan?

MR. LOWE: I don't see the relevancy of what she said.

THE COURT: Sustained.

MR. BERGER: Your Honor, I respectfully except.

THE COURT: Very well.

MR. BERGER: No further questions.

MR. LOWE: Nothing, your Honor.

MR. AIDALA: No questions, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Call your next witness.

MR. BERGER: I have no further witnesses.

THE COURT: The defendant rests?

MR. BERGER: We have the stipulations, your Honor.

THE COURT: Put those in now.

These are stipulations entered into between the attorney for the government and the attorneys for the defendants and the defendants themselves as to certain things.

MR. BERGER: One stipulation is that Kenneth Noonan, through his attorney, on or about October 20th, made a motion in the Supreme Court, County of Kings, relative to

his indictment, his felony indictment, for possession of a weapon. He made a motion to have that indictment dismissed, and the court denied his motion on or about October 20th.

At this time, your Honor, I offer in evidence Defendant's Exhibit C, which is the phone bill of William Rodman for the period November 22 through December 18, and Exhibit D, which is the calendar of the case of the people of the State of New York versus Kenneth Noonan in Supreme Court, Kings County, showing the various stages of the proceeding and when that proceeding was dismissed.

MR. LOWE: No objection, your Honor.

THE COURT: They will both be received.

XXX (Defendant Rodman Exhibits C and D received in evidence.)

T3

MR. BERGER: Defendant Rodman rests.

THE COURT: Defendant Rodman rests. All right.

MR. AIDALA: May we approach the bench?

THE COURT: Yes.

(The following occurred at the side bar.)

MR. AIDALA: Judge, this refers to the situation of Mr. Lowe having disregarded what I believe to be a fundamental rule of procedure, to say the least, which was a direct instruction by your Honor, namely, not to speak with the witness if the witness was on cross-examination.

THE COURT: I thought we covered that, Mr. Aidala, completely. We had a full discussion, I made a ruling at that time, and I will not do anything about it. I review the record, and if you want to see the record, we had a full discussion. I don't know why we need to bring it up again. I adhere to my original ruling.

MR. AIDALA: Judge, because I am most reluctant to call an adversary to the stand --

THE COURT: All right, but we had certain options available to us at that time. We went over them all, and the alternate suggestions were not adopted, and I ruled on them. That is the end of that.

I am not going to spend any more time on it.

MR. AIDALA: Then would your Honor permit, at

the very least, to avoid us having to call the prosecutor to the stand, to have the introduction of the minutes of that instruction?

THE COURT: No -- unless you have no objection, Mr. Lowe.

MR. LOWE: I am prepared to present a case decided by the First Circuit that is to the contrary, as far as Mr. Aidala's position about my breach of proper procedure is concerned. If Mr. Aidala wishes tocall me to the stand Mr. Edwards would like to be heard outside of the presence of the jury.

MR. AIDALA: To be heard in opposition?

MR. LOWE: He would like to be heard on the subject.

THE COURT: Are you planning to call Mr. Lowe or not?

MR. AIDALA: Judge --

THE COURT: Come on now! We are going to have summations this afternoon.

Do you want to call Mr. Lowe to the stand?

MR. AIDALA: Judge, I am deciding now that I will not call him, in the interests of preserving certain procedures.

THE COURT: Well, your record is clear, so is my

ruling. Very well.

(In open court.)

THE COURT: Defendant Rosenberg rests?

MR. AIDALA: Defendant Rosenberg rests.

THE COURT: All right, all defendants rest.

Members of the jury, that means we have completed our testimony in this case. What remains is summation of counsel. It is now a quarter to three, so that that would last, hopefully, not more than a quarter to five. I do not want to restrict counsel -- well, I will restrict them if it goes too far.

Maybe before we do that, we will give them a moment to collect their thoughts and perhaps make it even shorter.

We will take a five-minute recess; then we will complete the summations this afternoon.

My charge will take approximately 45 to 50 minutes, but I will not deliver that to you until tomorrow morning, the first thing in the morning, and then you will retire to deliberate after that.

All right.

(Whereupon, the jury left the courtroom.)

THE COURT: Mr. Berger, you, of course, renew your motion --

kp4

MR. BERGER: Yes, I do.

THE COURT: -- for a judgment for a verdict of acquittal; motion is denied, with an exception.

MR. AIDALA: Before I renew my motion, Judge, as to Government's Exhibit 13-A, which is the piece of paper with that figure of 200,000 --

THE COURT: Yes.

MR. AIDALA: -- your Honor admitted that into evidence under 10(b), namely, that it was some type of --

THE COURT: 1006, wasn't it? Better learn these new rules!

MR. AIDALA: The point I want to make is that testimony developed that that figure on that slip of paper is not a figure which reflects what is contained in the ledger book but is a combination of what is in that ledger book plus what Mr. Sunshine said was his memory, and that was unknown at the time your Honor received it into evidence. Now that it is known I submit that it therefore does not fit under the rules, and I move that it be stricken and not be given to the jury.

THE COURT: What do you have to say, Mr. Lowe?

MR. LOWE: Well, your Honor, I don't care about the piece of paper itself --

THE COURT: The testimony is in. Do you want

the exhibit eliminated from the record?

MR. LOWE: I don't care about the piece of paper.

THE COURT: All right, we will strike that as an exhibit andmark it for identification.

xx (Government's Exhibit 13-A in evidence now marked Government's Exhibit 13 for identification.)

MR. AIDALA: Judge, I make my motion --

THE COURT: Your motion is denied, with an exception.

MR. AIDALA: Thank you.

(Recess.)

THE COURT: How long are you going to take?

It is 3 o'clock.

MR. LOWE: Your Honor, I am guessing I will be about 30 to 40 minutes.

MR. BERGER: About the same, your Honor.

MR. AIDALA: I would imagine that is how long I will take.

THE COURT: The only thing I would like to say, Mr. Lowe, I know it is difficult, but I think you ought to, in your first go-around, cover everything you should, and your rebuttal should be really a brief rebuttal and not a re-summation or anything else.

I know it is difficult, but that was the purpose

kp6

of the new rule -- a very short rebuttal and not two summations.

MR. LOWE: Well, your Honor --

THE COURT: Cover everything you can in the first go-around.

MR. LOWE: I cannot quite anticipate all of the arguments. I hate to state ahead of time what I think their arguments are going to be.

THE COURT: I am indicating that you may be somewhat restricted in the length of time you are permitted on rebuttal.

While they are summing up make notes of the particular points you want to cover.

Bring the jury in.

(Jury in box.)

THE COURT: Just a brief reminder:

In the summations of counsel, we will proceed with the government giving the first summation to be followed by summations by the defendants, and then a short rebuttal by the government.

As I told you at the beginning of the trial, nothing that counsel say during the course of their summations is to be taken by you as evidence. It is the independent recollection you have as to the facts that counts. If counsel raises an objection that the other attorney is not giving an improper interpretation of the facts, I state it is your recollection that governs.

Counsel's purpose in summation is merely to review the facts that have been established here and the

reasonable inferences that should be drawn from the facts.

Opinions of counsel have nothing to do with the merits of the case.

Sometimes counsel do express their opinions as to the merits of the case, and that's of no consequence. They may give an opinion as to what they thing the evidence establishes, but as to the merits of the case, opinions of counsel count for absolutely nothing.

Counsel should not encroach upon the function of the court in describing to you what the law is. I should tell you about the law and that's my function. They will touch on it -- and I hope only briefly -- so I will not have to reprimand them in connection with certain conclusions as to reasonable doubt and presumption of innocence. I will charge you on that. I ask them to stay away from it except to touch it peripherally.

Mr. Lowe, you may proceed.

MR. LOWE: Counsel for the defense, and ladies and gentlemen of the jury:

We are now at the end of the case. All of the evidence in the case is before you. All of the evidence that there is for you to consider has already been put before you. Not one word of what is said from now until you get this case for deliberation is evidence. Nothing that I say

to you now or later, and nothing that any other lawyer says to you, and, indeed, even anything his Honor says to you, is not evidence in the case. All of the evidence comes from the witnesses and the documents that have been admitted into evidence. That's all you may consider as far as evidence is concerned.

As I told you in my opening, I told you that my opening statement was somewhat like a preview, a map, a plan of a trip you were about to take. Now we have been on the trip. Now it is time to decide whether or not the trip was as advertised.

I told you in the beginning the government's evidence was going to establish certain things, and it is now for you to determine whether, in fact, the proof did establish those things; whether your "travel agent," so to speak, gave you a good preview or a bad one.

As you know, this is a criminal case. That makes it different from any other kind of case. It makes it more serious and more important for everyone concerned. Because it is a criminal case, there are certain obligations, and it is the obligation of the government to prove beyond a reasonable doubt that each and every element of the crime charged was committed, and that is a burden which the government has, and that is a burden which the government assumes gladly

in this and any other case, because that's the way it is supposed to be.

We do not ask you to guess; we do not ask you to speculate; indeed, we do not even ask you to convict anyone unless you are sure beyond a reasonable doubt that they have done what they are charged with having done. Anything less would be a violation of your oath and it would be a violation of, really, the foundation of our system of criminal justice. That is why I say we gladly assume the burden of proof beyond a reasonable doubt.

A few days ago I told you that this case charged a conspiracy to violate the securities laws. I told you what, basically, that meant and what we would prove is that the two defendants before you on trial, Mr. Rodman and Mr. Rosenberg, formed a partnership in crime; that is to say, they agreed with each other that they would do certain things which, if they had been successful in completing, would have violated the criminal laws of the United States.

Needless to say, ladies and gentlemen, the government has not proved by any direct evidence that Mr. Rodman and Mr. Rosenberg sat down at a table and made a formal agreement of any kind to violate the law. We have not produced a document by which they contracted to become partners; we have not produced any photographs of them sitting around

planning anything. We don't have any direct evidence.

However, we do have circumstantial evidence, and the judge will charge you about the meaning of direct and circumstantial evidence in the course of his charge, and I won't go into it here except that when I get to that point in the evidence I will point out to you what the evidence is that the government contents establishes the existence of this criminal partnership.

Let's start from the beginning and review what the evidence is.

Unfortunately, the way a trial goes, and the way scheduled witnesses appear, it is not always apparent to you on the jury exactly what is being proved at any given moment in time: Exactly what is this person being called to the stand for? What is the meaning of his testimony? Why are they here? What is the significance of the testimony? Why are they important?

I don't intend to discuss the evidence with you in the order in which it was received before you. That would not help a bit. What I would like to do is put it together for you so you can see what happened in, what is more or less, a chronological fashion.

Let's start out with what we know about Mr. Rosenberg.

Mr. Rosenberg, you learned from the evidence, is a broker, a trader at a brokerage firm, John Maher Associates. The firm is owned by Mr. Rosenberg's wife. We know that Mr. Rosenberg and the firm of John Maher Associates were engaged in making a market, advertising themselves as buyers and sellers of a particular stock, Franklin Properties.

We also know that Mr. Rosenberg had control over a fairly sizeable amount of that stock. How do we know that? Starting from the end, the last witness that we called to the stand for the government, Mr. Robert Sunshine. Mr. Sunshine testified on his records and recollection and everything, that he delivered to Mr. Rosenberg a total of Franklin Property Stock, 261,960 shares.

4-2 We know from Mr. Sunshine that Mr. Sunshine and Mr. Rosenberg were endeavoring to sell out the stock delivered by Mr. Sunshine through the nominee names of Calvin, Patterson, and Federal Acceptance Company.

We know that not only because Mr. Sunshine told it to us, but we know it because the records, which I will get to in a moment, show it, and we know that we had Mr. Calvin and Mr. Patterson here. We know that they testified that they didn't have an account at John Maher Associates and they didn't know anything about anything, and that they had

not received any checks or anything of that nature.

The records of John Maher Associates, which are in evidence and can be inspected by you at your leisure in the jury room when you deliberate -- I will specifically refer to these documents, which are Government Exhibits 7, 7A and 7B -- these are the pages, or copies of the pages, from the customer ledger where John Maher Associates kept a record of all of the transactions that supposedly took place in the customer accounts.

T5

Now what do they show? They show, ladies and gentlemen, that for the account of A.J. Calvin a total of 21,600 shares were sold at various times and for various prices.

They show, ladies and gentlemen, that a total of 11,200 shares were sold out through the R.L. Patterson account -- again at various times and for various prices.

They show that 4900 shares were sold through the Federal Acceptance Company account at various times and for various prices.

They show that 12,400 shares were delivered from the Calvin account to somebody -- and Mr. Sunshine told us that between eighty and ninety thousand shares were returned to him. That leaves, ladies and gentlemen, approximately 120,000 shares of Franklin Properties stock in the possession of William Rosenberg delivered to him by Mr. Sunshine for sale.

In addition to that, ladies and gentlemen, you will recall a number of witnesses were called to the stand -- Mr. Landau, Mr. and Mrs. Jossin, Mr. Ritter -- and we find out that according to the records of John Maher Mr. Landau bought and received delivery of 6000 shares of Franklin Properties stock.

Mr. Ritter, according to the records, bought and

kp2

received delivery of 2000 shares.

Mr. and Mrs. Jossin, according to the records, bought and received delivery of 1000 shares -- and we know from their testimony that that did not happen. Somebody received them but it wasn't the three people that the books reflect.

Who do you suppose it was?

Now we have two other accounts on the books and records of John Maher Associates: Michael Scott and the Estate of Theodore Muollo.

Michael Scott, according to the records of John Maher Associates, and their customer card for him, shows a residence address of 100 Bellevue Terrace, Bloomfield, New Jersey.

Now you might recall that Mr. Protas got on the witness stand and said that he had lived there since 1956 at that address, that it was a single-family residence, that he and his family lived there and that he never heard of any Michael Scott. Nevertheless, the records of John Maher Associates show that Michael Scott bought and received delivery of 8000 shares of Franklin Properties stock.

Now we have another little record here relating to this Mr. Scott -- Government's Exhibit 11 in evidence --

two checks drawn on the account of John R. Maher Associates, Inc.; both of them signed on the front by William Rosenberg, and we know, ladies and gentlemen, that those checks did not go to Michael Scott.

Do you remember the man that testified last week, Charles Marcus, also known as Harry Leiderman, the check casher? Do you remember what he said? That he cashed those checks and that he got them from Mr. Rosenberg, and he gave Mr. Rosenberg the cash less his fee, which was 2 per cent.

Now, strictly speaking, ladies and gentlemen, there is nothing illegal about that man cashing those checks, but think about this: supposing you have a check which you have every right in the world to have, that has been given to you by someone who willingly gave it to you, and you are entitled to the money. Would you pay somebody 2 per cent of that just to cash it for you? Or would you take it to the bank and get all of it for yourself? Do you think perhaps the use of the check casher in this case was an attempt to hide something? Is there any reason for giving 2 per cent of the money -- unless it is an attempt to hide something? Why give it up?

As a matter of fact, ladies and gentlemen, all of this evidence about the records of John Maher,

kp4

and the checks, you might well find that it is an attempt to hide something, that it is an attempt on the part of William Rosenberg to hide the real owner, the person who really is interested in and who really has the benefit of the stock and the proceeds of those accounts -- and that's him and his partner, Mr. Sunshine.

Because, ladies and gentlemen, the checks payable to R.L. Patterson and A.J. Calvin, the same sort of thing, ladies and gentlemen. Government's Exhibit 8-A, all checks made out to A.J. Calvin -- everyone of them bearing the signature of William Rosenberg, and everyone of them cashed for William Rosenberg by Charles Marcus, also known as Harry Leiderman.

Even more interesting, ladies and gentlemen, Government's Exhibit 8, again all checks payable to A.J. Calvin and all bearing the signature of William Rosenberg, and they are all endorsed on the back with A.J. Calvin's signature which Mr. Calvin told us was not his. Then there is a number right underneath that signature. That number, ladies and gentlemen, is 019252145. That number, ladies and gentlemen, is on Government's Exhibit 12. It is the number of the personal bank account of William Rosenberg; and, ladies and gentlemen, I am not going to waste time to do it, but you will find the same thing to be

in the case of Government's Exhibit 9 in evidence, Raleigh A. Patterson or R.L. Patterson checks -- again all of them signed with Rosenberg's signature, all of them bearing that account number, the same account number of Mr. Rosenberg's personal bank account.

Those checks, you will recall the man from the Chemical Bank testified were deposited into the Chemical Bank. That is where Mr. Rosenberg's bank account is, and that is also where Maher's bank account is; and if you go over Rosenberg's bank account and take the dates of the checks and the amounts of the checks and you reflect the amounts on deposit in Rosenberg's bank account, you will see that those checks were deposited into Mr. Rosenberg's personal bank account.

There is one other account that I haven't yet mentioned to you, and that is the Estate of Theodore Muollo. Now, Theodore Muollo did not testify, and you might guess from the fact that there is an Estate of Theodore Muollo that he probably isn't around any more -- if he ever was; but he had a very interesting address -- the records of John Maher Associates, which were admitted in evidence, Government's Exhibit 7-G, show that John Maher Associates carried the Estate of Theodore Muollo at 52 Clarendon Street, Boston, Massachusetts.

kp6

Now if you think back to last week, we had a fellow with a rather heavy Massachusetts accent on the stand by the name of Nicholas Sheehan. Nicholas Sheehan owns that building. Nicholas Sheehan has his office in that building. Nicholas Sheehan receives mail at that building. Nicholas Sheehan knows nothing of the Estate of Theodore Muollo.

What is the connection? Nicholas Sheehan had an account at John Maher Associates.

Now what is the point of all that? From all that the government submits you can find the following: No. 1, Mr. Rosenberg had his hands on, control over a substantial number of shares. The arithmetic, ladies and gentlemen, is somewhere between one hundred and sixty and one hundred and seventy thousand shares of Franklin Properties stock.

Secondly, the evidence demonstrates that Mr. Rosenberg was not running around waving a flag to tell anybody that he did have that much stock. He was hiding it. He was hiding it in nominee accounts; he was hiding it in the accounts of customers who didn't know anything about being in their account. Why, ladies and gentlemen, would he hide it? Why wouldn't he want it in his own name?

I submit, ladies and gentlemen, that you might reasonably conclude that the reason for that is the same reason that he went to our friend, the check casher, to cash the checks but he didn't want people to know, he didn't want people to be able to right away put their finger on what was going on because he wanted to hide it.

Ladies and gentlemen, when you are engaged in something that is honest, legitimate, open, and above board, you don't have to think about hiding it. But when you are engaged in a transaction, or series of transactions, which are calculated to be fraudulent, you might think it would be a very good idea to try to hide your tracks as well as you possibly could.

MR. AIDALA: I object to that last line of argument, Judge, and move for a mistrial. He is talking about something that happened in 1974, not anything to do with this case.

THE COURT: Motion denied.

MR. LOWE: In that connection, you will find that 12,400 shares of Franklin Properties got delivered out of A. J. Calvin's account on October 23, 1974; that Lloyd Landow's account, according to the records of Maher, stock was delivered out of that account, 6,000 shares of Franklin Properties on November 23, 1975; and the Michael Scott account, stock was delivered out of that account on the 20th of November of 1975; theestate of Theodore Marlowe, the stock was allegedly delivered out of that account on May 7, 1975; so no matter what you hear from any other people, including me, ladies and gentlemen, you look at the records and you decide whether it relates to this case or not.

So now we have William Rosenberg having accumulated in excess of 150,000 shares of Franklin Properties stock. What is he going to do with it? Of course, he will try to sell it.

Even before Kenny Noonan gets in the picture, think back again to last week and remember another gentleman who took the stand by the name of Joel Marcus. Joel Marcus testified that his firm, Helfer Broughtan, started to trade the stock of Franklin Properties sometime in September of 1975, and that shortly after he started that he started advertising a price in the pink sheets, a price at which his

firm was willing to sell the stock.

What happened then? He said William Rosenberg called him up and said, "The price you put in the pink sheets is killing me."

What do you suppose he meant by that?

I submit, ladies and gentlemen, you can reasonably conclude that what he meant was that the price Mr. Marcus was offering to sell at was too low. It was lower than the price that Mr. Rosenberg wanted to sell at. Mr. Rosenberg wanted to sell that stock at one dollar.

What else do we know? That's what he kept telling Mr. Marcus, "Hold on to it. You will be able to sell it for a dollar. I expect the stock to be selling for a dollar."

Mr. Marcus could not sit there and testify as to what was going on because there is no proof he even knew what was going on, but you, ladies and gentlemen, have some idea of what was going on, and that's a very good idea of why Mr. Rosenberg expected to be able to sell that stock for a dollar. That's because he expected Kenny Noonan to do it for him in return for a bribe.

Let's get into that part a little bit.

Mr. Rodman and Mr. Rosenberg have a mutual friend, Mr. Leon Nash. Mr. Nash introduced the two of them, brought them together, for the purpose of having a merger take place

between some real estate operation that Mr. Rodman had something to do with and Franklin Properties. As far as we know, the merger didn't take place but I submit to you, ladies and gentlemen, that theevidence shows that another merger took place -- not the one that Leon Nash thought was going to happen, but the one between Mr. Rodman and Mr. Rosenberg. They themselves brought about a merger between themselves, and that's what this case is about.

This case is about the merger, the partnership, that those two men created, a partnership dedicated to unloading a block of Franklin Properties stock on the unsuspecting public in a fraudulent manner.

We don't know when and we don't know how they got together and made that specific agreement, but we know that they made it and here is how we know:

Mr. Noonan testified that during November of 1975 he was in contact with Mr. Rodman, and Mr. Rodman would tell him, "I am working on a securities deal now. If you want to be in on the deal, you are interested in making money, fine."

Noonan said, "I am interested. What's up?"

Mr. Rodman does not say any details or anything like that. But one little detail, ladies and gentlemen, and I submit to you this little detail is very critical in a

particular aspect, and that is this -- when you come to consider whether or not Kenny Noonan is credible, believable, whether you think he is telling the truth, think about this one little piece and see if this doesn't make it clear in your mind. Noonan testified, and, indeed, he wrote it down in his affidavit, that while these things were going on, on one occasion Mr. Rodman told him that Leon Nash might be involved in the deal. Do you remember Noonan saying Rodman told him that? Do you remember that?

What do we know? We know that Kenny Noonan barely knew Leon Nash; that he had met him once or twice, or whatever, several years before the incidents in this case. So Kenny Noonan would not have been able to say anything about Leon Nash, ladies and gentlemen, unless he got it from Mr. Rodman. That's the only way he could have known. Leon Nash was up here and he did not say anything about Kenny Noonan. We even know that Kenny Noonan didn't get that idea from Mr. Rosenberg. Here's how we know that:

When Kenny Noonan asked Mr. Rosenberg whether Leon Nash was involved in the deal, Mr. Rosenberg told him no, that he was not. As far as the evidence shows, ladies and gentlemen, he was not, but he was involved in Mr. Rodman's mind with the overall picture. He was the one that put Mr. Rodman together with Mr. Rosenberg. He was the one who

arranged for this marriage.

6-2 So when you consider whether Kenny Noonan is telling you the truth, ladies and gentlemen, think about that little piece. It is a piece that he could not conceivably have made up, could not have made up no way.

Now we find ourselves in December. What do we know about that time? On December 3rd, Mr. Noonan testified, Mr. Rodman called him and told him to go to a safe phone and call him back. They had this conversation where finally Mr. Rodman revealed to Mr. Noonan the details of the deal; that if he sold Franklin Properties stock to his customers for a dollar a share, he would be paid 50 cents a share in cash for doing so -- in cash -- not in a check that could be traced. It was to be in cash.

Mr. Noonan discusses it with Mr. Rodman and wants to know how he is going to get paid, and things of that nature. As of this point, what he has is the outline of the deal and some knowledge, as it was pointed out in the course of his cross-examination, that he knew what he was being offered was an illegal deal.

What did Mr. Noonan do next?

Before he even got in touch with Mr. Rosenberg, Mr. Noonan reported the illegal deal that had been offered to him to the United States Attorney's office and that,

pgcg

ladies and gentlemen, is what led to the most important evidence in this case, and I am referring to those tape recordings which you heard last week.

The first thing Noonan told you he did was that on the morning of the fourth, after Rodman given him the offer, he called up the United States Attorney's office and reported it, and that after that happened, Rodman called him again and told him to get in touch with Bill, and he gave him the telephone number.

Noonan again reported that to the United States Attorney's office, and then Noonan went and called Bill at the phone number. Remember? Do you remember what happened when he did? Remember, at this point in the game he has already reported to the authorities what is going on. He told you that he called up that phone number, he asked for Bill, and a guy got on and said he was Bill, and he told him, "I am Kenny Noonan, and Billy Rodman told me to call you about Franklin Properties."

Ladies and gentlemen, I told you when I started that we were not going to be able to show you a document or photograph, or anything like that, that proved there was a partnership. I told you we would prove it by circumstantial evidence and we are at that point right now.

Kenny Noonan did not know William Rosenberg, had

never met him, and that for the fact that he knew that Mr. Rosenberg was a defendant in this case and was sitting at the table, would not have been able to say who Mr. Rosenberg was. He had no idea who Mr. Rosenberg was until after it was all over.

How does Kenny Noonan get to talk to William Rosenberg? He gets to talk to William Rosenberg, ladies and gentlemen, because William Rodman tells him to.

mkp1

T7

It is that fact -- not alone but in conjunction with a few others that demonstrates to you that there was a partnership here.

Rodman calls up Noonan because,as you heard the testimony, Noonan and Rodman had some sort of business relationship on various things that went back quite a few years. Rodman knew Noonan; Rosenberg did not.

So Rodman went out and tried to corral Noonan to bring him into their crooked scheme; and then when Noonan said, "I've got to make sure about getting paid," Rodman said, "I'll put you in touch with the guy who is responsible for getting you paid" -- and that is who Kenny Noonan gets to go to, William Rosenberg, only because Rodman sent him to William Rosenberg, and that is the only reason, ladies and gentlemen, and the only reason Rodman would do that is if he had an understanding with Mr. Rosenberg ahead of time, that that is what they were going to do. And it is that kind of understanding, ladies and gentlemen, that is the conspiracy that these people are charged with.

Let me point out something that is a matter of record and that is very interesting, in light of all of this. We have here Government's Exhibit 1. Government's Exhibit 1 is the records of the Holiday Inn in Binghampton, New York. Those records show that on the 1st, the 2nd

and the 3rd of December of 1975 William Rodman was registered as a guest at that hotel.

Those records show, among other things, that Mr. Rodman was at the hotel on those days, and that the hotel has a telephone number that is Area Code 607 729-6371.

We also have evidence here, ladies and gentlemen, the records from the Telephone Company of the toll calls made from John R. Maher Associates, and on those records, ladies and gentlemen, you will find that as early as October the 29th of 1975 somebody from John Maher Associates was calling Mr. Rodman at his home in Spring Valley, New York, at a telephone number that the records show were his home telephone number: 914 352-5884.

Now the evidence on this record speaks volumes. Do you remember the dates when Noonan said he was being told the details? He was being told the 3rd and the 4th -- right? On the 3rd he gets the details, and on the 4th he got the word to call Bill at that telephone number. These records, gentlemen and gentlemen, demonstrate that on the 2nd of December, 1975, a phone call was made from John Maher Associates to that Holiday Inn in Binghampton, New York, where Mr. Rodman was staying.

They show, ladies and gentlemen, that two phone calls in fact were made on that date to that place.

kp3

They also show that on the 3rd of December a total of three phone callswere made from John Maher Associates to that Holiday Inn where Billy Rodman was staying -- at the very time that Rodman finally was revealing the details of the deal to Kenny Noonan, somebody from John Maher Associates was calling the very place where Rodman was staying.

Now what do we know? We had three people from John Maher Associates on the stand: the president, Arthur Pendrick. He doesn't know Billy Rodman and never called him.

The cashier, Lou Scala, he doesn't know Rodman and he never called him.

And Arthur Fine, he doesn't know Bill Rodman and he never called him up.

And all during that time, they asked on cross-examination, "Oh, don't customers come in sometimes and use the phone and make telephone calls," et cetera? And they said, "Sure, that happens, people make phone calls."

Ladies and gentlemen, it is an incredible coincidence tobelieve that some customer just happened to be there on the 2nd and the 3rd of December and just happened to call the Holiday Inn. The only really logical conclusion, ladies and gentlemen, is that William Rosenberg

wascalling William Rodman on the 2nd and the 3rd of December, and based on what you know Mr. Noonan told you happened, you know what they were talking about.

Now we get to the 4th. We know that on the 4th of December Kenny Noonan was trying to call Bill Rosenberg in the afternoon.

We know that from Arthur Pendrick, andwe know it from Noonan as well. He was trying to get him on the phone, and remember Arthur Pendrick was very concerned to get out the fact that the reason he remembered it was that Mr. Noonan was so urgent. Now I am not sure what is so important about Mr. Noonan being urgent, but remember this -- and this is what Mr. Noonan told you -- it is that his interest at that point in time was really one thing: he had told the story to the authorities, and at that point in time he knew that the only evidence that he was telling the truth was that he said so; and, quite frankly, ladies and gentlemen, you might well say to yourselves that "That just isn't enough for me." Mr. Noonan was interested in getting some evidence to back up his story to prove that he was telling the truth.

Now whether he was urgent or sounded urgent or not, that's what he was doing. He wasn't any longer looking to do any business with Mr. Rosenberg. He was looking to

kp5

ask Mr. Rosenberg questions on the telephone so that Mr. Rosenberg's answers could be recorded and so that he could get up on that witness stand and say, "See, it is just like I said it was."

That is the same Arthur Pendrick, ladies and gentlemen, who between the time that he testified and the week before began to lose his memory. That is the same Arthur Pendrick who was the president of the firm for which Mr. Rosenberg is the trader.

It is the same Arthur Pendrick who is the president of the firm of which Mr. Rosenberg's wife is the owner.

I submit you could well find that Mr. Pendrick was up there reluctantly saying what could be dragged out, and nothing more than that. And that is so that natural -- he doesn't want to hurt anybody, but what he told you was that he told William Rosenberg that this guy Kenny had called and William Rosenberg told him, "Oh, yeah, that same guy may be coming in to buy a couple of thousand shares of Franklin Properties stock."

That is what Mr. Rosenberg told Mr. Pendrick what was going on before Mr. Rosenberg realized that anybody else knew what was going on. He did not tell Mr. Pendrick on the 4th or the 5th, I guess it would have been, of December, that "That guy Kenny that is calling up, I am

kp6

just leading him on" -- he did not tell him that day.

And he told him," Some guy is coming in to buy a couple of thousand shares of Franklin Properties stock."

He did not tell that story to Mr. Pendrick as Mr. Pendrick finally admitted until after he got indicted.

While the deal was going on he wanted to work, but after he got indicted and heard the tapes he then needed an explanation for the tapes, so his story was, "I was just leading that guy on."

Do you remember something? He went out that afternoon, ladies and gentlemen. He told Mr. Noonan, "I'm going out for the afternoon. If you want to start doing any business, Artie or Louie can take your orders." That's what he told Noonan.

He was just leading Noonan on! He has no way of knowing that while he is gone for the afternoon Noonan is not going to send the orders in from his firm, and Artie and Lou will fill the orders. He is not leading him! He is hoping Noonan can come through because then he can sell the stock and make a profit.

That leading him on, ladies and gentlemen, you can well find is a story that Mr. Rosenberg made up at a time when he knew he had to have some explanation for that conversation that he learned was on tape, and he could deny that it happened, and he could get up and have his attorney get up and attack the credibility of Kenny Noonan until he was blue in the face; but that tape was not going to go away. It is there, and it is stillthere.

That night, after Noonan talked to Rosenberg in

the morning, and having been unable to get him that afternoon or that evening at his home, called Mr. Rodman at Mr. Rodman's home. Ladies and gentlemen, that was a call that was made from the United States Attorney's office by Mr. Noonan with Mr. Doonan -- and don't confuse the two of them. The names sound the same but they are different. Mr. Doonan helped him out. He made a recording of it and listened to it all.

There is going to be a lot said as to what was the meaning as to what Mr. Rodman said on this tape. What does it mean? You are going to hear something to the effect, "Here's Mr. Rodman telling Mr. Noonan, 'Get away from me. I don't want anything to do with this,' and so forth."

I submit to you, ladies and gentlemen, that you should consider the tone of voice that Mr. Rodman was using when he was saying those things, and if you have forgotten, you can listen to the tapes again as many times as you would like when you go into your deliberations. I urge you, any evidence, any documents, the tapes, if you are not sure, ask for them, ask to look at them, examine them. It is all there, and that's what it is there for, for your information, to help you decide this case.

Do you want to hear the tapes? Ask to have the tapes played or even to take them into the jury room with a machine and play them yourselves.

When it comes down to it, if you are not sure, you don't remember what the testimony was on a particular point by a particular witness, ask to have it read to you. See, these people (indicating) have been in court every day taking down everything. They are really quite good at it. Sometimes I am amazed at the things I say when I read the transcript, but it is not because I didn't say them, it is because I didn't think them out very well before I let that out of my mouth. They are very good and they can read it all back to you if you can't remember. If you have a problem like that, ask, because it is better to be sure than to make that kind of mistake because you don't remember.

In any event, we do know that Mr. Noonan had been told by Mr. Rodman to call this guy Bill at a telephone number, and Mr. Noonan says to Mr. Rodman, "I know who this guy is, by the way."

Now Mr. Noonan didn't know who the guy was before that, when he last spoke to Mr. Rodman, and Mr. Rodman only gave him a first name and a phone number. Mr. Noonan found out by calling the offices of John Maher who this guy Bill was. It is the only Bill at John Maher. That's how he found out. And he said that, ladies and gentlemen, "I know who this guy is, by the way," and the answer on the tape for Mr. Rodman is, "All right. I don't know. I don't. Okay?"

Do you suppose that what Mr. Rodman meant to say was that he didn't know who this guy was, or do you suppose that Mr. Rodman, whom you may recall told Kenny Noonan to go to a safe telephone to call him back the day before, do you suppose Mr. Rodman was giving Mr. Noonan a message? "I don't know. Okay?" In other words, I am not going to say it out loud, and as far as anybody is concerned I don't want it to be known that I know who this guy is. I want to stay out of it. I don't want to leave any tracks.

I submit, ladies and gentlemen, that's what Mr. Rodman is telling Mr. Noonan at that point.

Mr. Noonan is telling Rodman how he is going to get a half, and "a half," is 50 cents. That's a slang expression.

Then there was "less 5 percent for somebody to do the checks," or something like that.

Mr. Rodman says something to the effect of, "Well, that's your business. I don't want to know."

Again, Mr. Rodman doesn't have to be told. He knows what is going on, but he doesn't want to know for the record. He doesn't want anybody else to know that he knows because, ladies and gentlemen, if Mr. Rodman didn't know, how did Mr. Noonan get there to begin with? This is a conversation in which Mr. Rodman is simply trying to avoid

coming out and saying it, and also sort of giving Mr. Noonan a message: "Don't talk about this kind of stuff on the telephone," because Mr. Rodman, who is concerned about using safe telephones, you might find that he's a little concerned that exactly what happened here could happen to him.

But finally, what Rodman does say -- and this is indication to you as to whether Mr. Rodman wants this deal to go through or not, because he is telling him: "I am worried about getting paid from this guy. How do I know I am going to get paid?"

That's Noonan's whole pitch.

Rodman says, "Seriously, I would not worry about that aspect of it, okay?"

What's that like, ladies and gentlemen? That's Mr. Rodman telling Mr. Noonan that he doesn't have to worry about getting paid; that Mr. Rosenberg will pay him. That's what he is telling him.

Then he says, "The only thing I was worried about was that you were not going to get a full count."

8-2 You know if Kenny sold X numbers of shares maybe he would not get full credit for everything he sold. And Mr. Rodman said, "I spelled it out to him."

Mr. Rodman spelled it out to Mr. Rosenberg:"If I put Kenny Noonan in this deal he gets a full count, a fair

count, and a fair shake, and he gets paid."

What does Mr. Rodman say? That Mr. Rosenberg told him he understands that, and then Mr. Noonan says, "I got to direct everything to him; I have to direct everything to John Maher."

And Rodman says, "I don't know if you can, you know."

Noonan was asked about this. How does it work in the business? In the business, when you are a broker and you are a customers' person, you represent the customer as a registrered representative and the customer wants to buy a stock based on your recommendation, you give the order ticket to a clerk in the order room and this clerk calls around and looks for the best price to buy it for, the cheapest price he can get it for the customer, and that's the obligation he has to the customer.

Mr. Rodman says, "I don't know if you can, if you can direct it all to Maher. If you can, great."

What did Mr. Noonan say? He said that if he had a corrupt clerk he could have written down on the ticket, "Go to Maher for the stock," and the guy would say okay.

He said he didn't have a corrupt clerk, he did not have one.

What did Mr. Rodman say? "If you can't, that's

if you can't direct it all," -- because Mr. Rodman, being in the business, knows that maybe he can't push all the stock into Maher, "Push all the purchase orders into Maher directly. You just make sure that he understands. He has got to make up for it," namely that Mr. Rosenberg has to pay anyway because that's the deal.

The conversation ends with Mr. Rodman wishing Mr. Noonan good luck and they discuss chatting with each other on the following day.

The following day Mr. Noonan is back in the United States Attorney's office and he is on the telephone to Mr. Rosenberg. Ladies and gentlemen, this tape recorded conversation practically by itself establishes beyond a reasonable doubt that Rosenberg did just what the indictment says he did.

It starts out with a brief introduction as to why Mr. Rosenberg was not available a little while earlier when Noonan called for him, that he was in the john.

Now there is going to be some talk as to how Mr. Noonan lied to Mr. Rosenberg; he told him lies on this tape. What he did, ladies and gentlemen, was to make believe that he was going to go through with the deal, to make believe that he had something good to offer Mr. Rosenberg, and what do you suppose he was doing? He was trying to get evidence

because he had talked to Rosenberg the day before -- he told you that -- and Rosenberg told him the entire deal. He didn't need to know any more about the deal. What he needed now was evidence to back up that what he said the day before did happen, that he was telling the truth about it.

So he goes into the whole thing with Mr. Rosenberg: "The deal has changed a little bit for me. I got a guy maybe take down 30,000 shares."

That's made up. So what?

Mr. Rosenberg's response to it is, "Terrific. Okay. That's fine."

Kenny says, "Do you suppose we can sweeten the deal a little bit because I come in with such a large amount of purchasing?"

What did Mr. Rosenberg say? No. That's it. This is what I have to pay on one side, and this is what I have to pay on the other side. 50 cents is the best you can do."

What he says in response to 30,000 shares being purchased, "15 can go," and I submit, ladies and gentlemen, you can find that meant $15,000 is what Noonan could get in cash if he did that deal, if he got 30,000 shares bought for one dollar.

Remember, this is an interesting thing about Mr. Rosenberg, who is just leading Kenny on. Mr. Rosenberg

was even trying to rip Kenny off. Mr. Rosenberg told him to figure 5 percent for cashing the checks. Do you remember that on the tapes "Figure 5 percent, and I make nothing on that. Another guy does that, and that's a way of laundering that."

Well, we brought the laundry in for you. Charlie Marcus, also known as Harry Lighterman, he is the laundry, the check casher. What does he tell us? He charged Rosenberg 2 percent to cash those checks.

So Rosenberg is telling Noonan it is going to cost 5 percent.

Where do you suppose the other 3 percent is going? It is going into Mr. Rosenberg's pocket.

That's interesting. Mr. Rosenberg, the evidence shows, has a history ofdoing things like that, of not even playing straight with the guys he is working with in his deals.

MR. AIDALA: Judge, I am sorry to interrupt, but I object and move for a mistrial.

THE COURT: Motion denied.

MR. LOWE: Government Exhibit 13C in evidence contains what Mr. Rosenberg, in his own handwiting, gave to Mr. Sunshine as an accounting for what happened to the shares, Calvin, Patterson, and Federal Acceptance, that

Sunshine sent to Rosenberg to sell.

Ladies and gentlemen, if you take this piece of paper and compare it with the actual records of John Maher, it would show the sales for the accounts of Calvin, Patterson, and Federal Acceptance, and you will learn something. You will learn that not as many shares were actually sold as this paper shows was sold, and you will learn that those shares that were sold were not sold at the prices listed on this sheet of paper either.

mkpl

T9

This shows in June of 1974 shares for the Calvin account of a certain number of shares, and the prices -- 10 cents, 15 cents; Patterson 15 cents, 15 cents, 20 cents, 20 cents, 25 cents.

And there are thousands of shares listed here, ladies and gentlemen.

This is the accounting that Mr. Rosenberg rendered for these nominee accounts to Mr. Sunshine who gave him the stock to be sold.

Look at the records. You will find a few sales in the Calvin account for half a dollar a share, three-quarters.

Federal Acceptance stock being sold at a quarter, a half, a half, a half.

As I said, if you add up these numbers here they will show a lot more stock having been sold than the records actually show were sold. Mr. Rosenberg was not giving an honest accounting, I submit, to Mr. Sunshine. Mr. Rosenberg, the evidence shows, was not going to give an honest accounting to Kenny Noonan. Mr. Rosenberg, ladies and gentlemen, was not going to give an honest deal to the stock-buying public.

I don't want to be tedious to pursue everything that is said in this taped conversation between Noonan and

kp2

Rosenberg. You have heard it, and if you want you can hear it again -- it's all in there -- every aspect of the case that you could think of, including, ladies and gentlemen, that it is all going to be a big secret -- "You and I don't even know each other when it comes to that kind of stuff" -- that is Mr. Rosenberg talking -- "When it comes to this pay-off you and I don't even know each other."

Sound familiar? Sound a little bit like Mr. Rodman's statement on the tape the night before? "I don't even know the guy -- right?"

"Okay, I don't even know him" -- sound familiar? -- all going to be a big secret -- one big happy family -- terrific!

And of all things, ladies and gentlemen, we have Mr. Noonan going so far as to ask Mr. Rosenberg about this fellow, Joel - - from Helfer, Broughtan -- and Joel Marcus was here, and he said he is the only "Joel" at Helfer, Broughtan, so it is him they are talking about.

And what is Mr. Rosenberg saying? "He is not a good guy to do business with. He is strictly from that kind, but he will play ball because his tongue is hanging out."

You saw Mr. Marcus, and you heard him testify.

You heard him testify that he had acquired some of the stock, and he had bought it fairly cheaply, and of course he would be happy to sell it for a dollar.

Do you remember this -- he was asked, "Did you conspire with Mr. Rosenberg to do a deal with Mr. Rosenberg to manipulate the stock and puff up the price?"

He said, "No, of course not."

"He is strictly from that kind -- not a good guy to do business with."

What do you suppose Mr. Rosenberg meant by that? Do you suppose that he meant that Joel Marcus was an honest guy, and that he was straight, and that he was only going to do what he thought was best for his business and his customers, and that he wouldn't get involved in a deal of the nature that was being offered to Kenny Noonan -- an illegal deal? -- that he would only do the best he could honestly? Do you suppose that that might be what Mr. Rosenberg meant that he said, "Not a good guy to do business, I don't think you can trust him, and he is strictly from that kind."

I don't know, ladies and gentlemen, what "that kind" is or what it means, but I think you might figure out what it means -- the kind of people who won't go and form a criminal partnership with Mr. Rosenberg.

Those tapes are there, and no amount of talk by

me or any other lawyer in this courtroom is going to change what is on those tapes, or make them go away. The documents are all there, and again no amount of talking by anyone is going to make them go away.

There are only a few more points I want to make before I am finished, and one of them is this -- and, again, talking about a conspiracy and a partnership -- Kenny Noonan is talking and he is telling Mr. Rosenberg, "The only reason I am dealing with you on this basis without some kind of guarantee is that Billy Rodman wouldn't put me into somebody -- and the expression is rather impolite so I will just refrain from mentioning it -- and Mr. Rosenberg says "You can trust me implicitly."

And then the next line, ladies and gentlemen, speaks volumes. It says perhaps more eloquently than any oratory that I can bring to bear on this subject exactly what this case is about. Mr. Rosenberg says "if Bill O.K.'s me, trust me. That's all I can tell you."

That, ladies and gentlemen, is what these people are charged with, and that, ladies and gentlemen, I think you will find is what happened.

Now before I conclude I want to make reference to one thing. Mr. Noonan has a record. Mr. Noonan has not done in the course of his life everything according to

kp5

the straight and narrow and according to the law. When he was 19 years old he got involved in a check forgery matter out in California; and later on he got involved with this gun business. As a matter of fact, on one occasion he pointed a gun at Mr. Rodman to get his money from him. Mr. Noonan, ladies and gentlemen, is not necessarily a nice guy. He is not necessarily to be held up as an example for the youth of America to follow. He is not perhaps the kind of person you would like to invite home for dinner -- and perhaps if you did invite him home to dinner you would count the silver before he left. But Mr. Noonan can be all of those things without being the one thing that he may be in order for the defendants to be successful in achieving their goal in this case.

Ladies and gentlemen, he must not be telling the truth in order for the defense to be successful, because if Mr. Noonan is telling the truth these men are guilty.

And, ladies and gentlemen, it isn't Mr. Noonan's voice alone that tells you what happened. It is Mr. Noonan's voice from the witness stand but it is the voices of these men themselves, Mr.Rodman and Mr. Rosenberg, that tell you this, no matter how much you may dislike or disapprove or even in the last analysis distrust Kenny Noonan personally

kp6

and alone, you are not being asked in this case to rely on Kenny Noonan personally and alone. Kenny Noonan's story was backed up, corroborated by the very people who sit before you as defendants in this case.

There is a biblical line that says something like "By their acts ye shall know them."

By their conversations on these tapes, you ladies and gentlemen will know these defendants.

Keep your mind on what the evidence really is. Don't let your eye get taken off the ball; and remember that Kenny Noonan is not on trial here, that his sticking a gun at Mr. Rodman doesn't have anything to do with this case; that the fact that he had forgery charged against him in California when he was 19 doesn't have anything to do with this case;and that if that's all there is to say, when I get finished, is that Mr. Noonan is no good and you shouldn't believe him, then, ladies and gentlemen, that's damn good, because those tapes are going to be there after everybody is finished talking.

I submit, ladies and gentlemen, that on the basis of those tapes there can be no doubt that both Mr. Rodman and Mr. Rosenberg are guilty of conspiring, that is, agreeing with each other to violate the fraud laws of the United States.

Thank you for your attention.

THE COURT: Mr. Berger

MR. BERGER: Your Honor, is it possible to get --

THE COURT: Can we get a t[illegible] of some kind?

(Discussion off the record.)

MR. LOWE: Your Honor, may we have a two-minute recess?

THE COURT: Yes.

(Recess.)

(The following occurred in the absence of the jury.)

THE COURT: Yes, Mr. Berger?

MR. BERGER: I would like to ascertain whether we are going to complete all, including rebuttal?

THE COURT: We had better finish the summations and the rebuttal tonight.

MR. BERGER: Thank you.

MR. LOWE: My apologies, your Honor. I went long beyond the time I predicted, but I think with your Honor's admonition in mind that I had better not leave anything out.

THE COURT: Well, we will take it off at the other end!

(Jury in box.)

MR. BERGER: May it please the court, Mr. Lowe, Mr. Aidala, and ladies and gentlemen of the jury:

I would like to take this opportunity to thank you on my behalf, and on behalf of my client, Mr. Rodman, for the matter in which you have performed your jury service during this trial.

The right to a trial by jury is one of the most important rights of any defendant, and it is also your right, as citizens, to sit as jurors. Although we commonly say you are performing your jury duty, you really are taking advantage of a right, and I can think of no case in which the facts are such that the importance of having a jury of your peers is greater -- none.

In 1100 King Henry I, in England, centralized the King's Courts. Up to that time each province, each small town, had their own judicial system; each judge, each prosecutor, the defense attorneys, knew the people that lived in the village in which they were dispensing justice. But for the next 100 years after King Henry I started to centralize the judicial system in England, that system became more and more the King's Court, the King's Justice, and that worked fine. There was no problem with that as long as the King was a kind king, or a benevolent king, or an

intelligent king. The system worked very well. It was a uniform system of justice throughout England.

Prior to 1200, when Richard the Lionhearted was king, the system worked exceptionally well, but then, approximately in the year 1200, Richard the Lionhearted, the benevolent king, the good king, died. King John assended the throne of England. King John was not a benevolent king; he was not a good king. It became commonplace in England to buy and sell justice. It became commonplace in England for King John to accuse certain barons in his kingdon of felonies, of crimes, and he would do this because if he were able to convict these barons of the crimes of which they were accused they would forfeit their property to the king, just as much as today the defendant is convicted he forfeits certain rights to the state, certain rights that he has as a citizen.

King John would use informants, he would use people that would get up and testify to the guilt of the baron that he accused, and after this baron was convicted then King John would take over the baron's property and he would give a certain amount, a certain gratuity, to the witness. The witness would derive some benefit from his testimony.

In the year 1213 the barons in England formed

a council, and that council met in Saint Albans, near London, and they drew up a list of demands which they wished to present to the king, King John, which demands would have given certain rights to the barons and certain rights to the free people, the freemen of England.

After these demands were written up, they were twice presented to King John, and twice he refused to sign them.

Finally, in the year 1215, June 15, at Runnymede, which is on the Thames River near London, the barons and churchmen assembled an army. King John's army met that army on the field, and when King John saw how hopelessly outnumbered he was, he gave in to the demands of the barons, the freemen, the church, and this was the first time in history that the absolute authority of a king in England was in any limited, because up to that time the king's powers were supposed to have come from the church, not from man. When he signed that document that was given to him in the year 1215, he gave certain rights for the first time, certain specific rights, to every freeman in England.

That document is known as the Magna Charta. The Magna Charta is the cornerstone of democracy as we know it today. It was made up of 63 demands, and one of those demands was the right for every man to have a trial by a

jury of his peers.

So, ladies and gentlemen of the jury, although up to now you felt you were r[illegible]ming jury duty, you really are exercising a right which goes back to the year 1215, a right over which freemen were ready to go to war, a right which today is the fundamental building stone of our judicial system.

It is only in a democracy that people will undertake a right and insist upon a right so onerous as the right to sit on a jury. There is no more onerous right than the right to judge one's fellow man, to sit in judgment of one's fellow man You will probably be making one of the most important decisions you will ever make in your life. The decision you will make will be one of the most important decisions ever made in the life of Bill Rodman because today and tomorrow, the days until you reach your verdict, are the most important days in the life of William Rodman.

The judge will tell you that every defendant at the beginning and throughout a criminal trial, and up until the time that the government proves beyond a reasonable doubt otherwise, is presumed innocent. The presumption of innocence is not some fictitious,non-existing, non-living thing. It is a living, breathing, thing, like the right to trial by jury. The presumption of innocence also is one of

the foundations, one of the cornerstones, of our judicial system.

It is said that a defendant is cloaked in innocence and that he continues to wear that cloak of innocence until the government proves beyond a reasonable doubt that he is not innocent.

"Beyond a reasonable doubt" does not mean conjecture or inference; it does not mean guessing. That means evidence beyond a reasonable doubt. The type of evidence which you would rely upon when reaching a decision which is one of the most important decisions you could make in your personal life, that is the type of evidence you must rely upon, that is evidence beyond a reasonable doubt.

What is this case all about?

The indictment charges that Bill Rosenberg and Bill Rodman were partners in crime. That's what this case is all about.

10-2 The indictment alleges that Rosenberg accumulated 150,000 shares of Franklin Properties stock. The indictment also alleges that Rosenberg and Rodman agreed to inflate the price of the stock to one dollar per share. Remember that: They agreed. They agreed to inflate the price of the stock.

The indictment charges that Rosenberg and Rodman

agreed, as partners in crime, to pay Noonan 50 cents per share for every share of stock, Franklin Properties stock, that Noonan stold at one dollar.

The indictment also charges that Rodman and Rosenberg, as partners in crime, agreed to use the mails to effectuate their scheme to defraud.

This case is not about anything either Mr. Rosenberg or Mr. Rodman may have done in the past that was not in furtherance of this conspiracy. I beg of you, don't take your eye off the ball. Give each defendant separate consideration, because your decision, your verdict, is not based on whether you believe one of these defendants intended to do something wrong, not whether one of these defendants intended to sell stock to the public, this case is about whether Rodman and Rosenberg reached an agreement intending together, working together, to take this stock and sell it to the public. That's what this case is about.

If the government proves that Bill Rosenberg cashed checks, that doesn't prove that Rodman and Rosenberg were partners in crime as alleged in the indictment. The key to this thing is what is in the indictment. Did the government prove beyond a reasonable doubt the allegations in the indictment? Not some other crime, and not some other crime that may have taken place at a different time, but

did the government prove the crime alleged in the indictment?

In addition to that, the government has the burden of proving beyond a reasonable doubt that Bill Rodman willfully and voluntarily entered into an agreement with Bill Rosenberg as alleged in the indictment, and I beg you again, don't forget those words: Willfully and voluntarily. Did he willfully and voluntarily enter into an agreement, a partnership in crime, as alleged in the indictment?

The title of this case is the United States of America versus Bill Rodman and Bill Rosenberg. I cannot think of any more awesome title. The United States of America against --

But let's remember one thing: It was not the United States of America that was sitting on that witness stand testifying; it was Ken Noonan that was sitting on that witness stand testifying. The United States of America does not vouch for his credibility, for his honesty, for his integrity, for his truthfulness, for his lack of motivation. No, they don't vouch for those things.

Ask yourself this: Did the United States of America use Ken Noonan as a witness or did Ken Noonan use the United States of America?

The evidence in this case, as we boil it all down, amounts to two things: The testimony of Ken Noonan and the

credibility you are going to give that testimony, and the recordings which were made between Ken Noonan and Bill Rodman, and Ken Noonan and Bill Rosenberg. That is the crux of the government's case. Everything else next to that is window dressing.

When you consider the recordings, remember one thing: Those recordings are nothing more than the tip of the iceberg. They are the tip ofthe iceberg. The recording between Rodman and Noonan must be evaluated, not only by what was said on the tape but Ken Noonan's testimony as to what transpired to come up to that recording; the circumstances surrounding the making of that tape must be considered by you when you try to interpret that tape.

It reminds me of the story of a little boy that has two failings, two serious failings. He is always coming home late from school and he always lying. One day his father says to him, "Son, if you ever come home late from school again, or if you ever lie again, I am going to have to punish you."

The son says, "Dad, I promiseyou, I will never come home late from school again and I will never lie again."

Then, the following day, what happens? He comes home late from school.

His father says to him,"Son, I told you if you

ever come home late from school again I would have to punish you, and unless you can give me a good explanation as to why you are late from school I am going to have to do that."

The boy said, "Dad, it was not my fault. I tried to get home on time. In fact, I tried to take a short-cut home from school. I cut through the woods and on the way through the woods this big bear got in front of me and I tried to get around the bear; I tried to go to the left and to the right but I could not get away from it. It began to chase me, and before you know it that bear cornered me. I picked up a stick and I hit that bear, and I hit that bear, and I hit that bear until I killed it. That, Dad, is why I am home from school late."

The father said, "Son, not only are you home from school late, but you have lied, and now I am really going to punish you."

The little boy said, "Dad, I didn't lie. I can prove I killed that bear. Here is the stick!"

Well, ladies and gentlemen of the jury, that stick did not prove that that little boy killed the bear, and that recording between Noonan and Rodman does not prove that Mr. Rodman was Mr. Rosenberg's partner.

mkpl

T11

You have got to look at all of the surrounding circumstances. You have got to listen to the tape, examine it in the light of all the evidence. And bear in mind the particular relationship that existed at that time between Mr. Rodman and Mr. Noonan.

And what were some of the facts that existed at that time?

First of all, Mr. Noonan was under indictment for a felony in Brooklyn for carrying a weapon. He had on October 20th made a motion to have that felony indictment dismissed, and around October 20th the Court denied his motion and said he would have to stand trial.

Bear in mind, what was Noonan's state of mind relative to that indictment when he called up Rodman back on November 21st? What was his state of mind? Because that is what is below the waterline. The rest of it is the tip of the iceberg.

Bear in mind that back in 1973 Mr. Noonan held a gun to Mr.Rodman's head. What more frightening experience can you imagine than a person turning around on you and taking a gun and holding it to your head and saying, "You give me my money or else!" I can't think of any more frightening experience, any experience that would create a more lasting experience than having somebody take a weapon

kp2

and point it to your head.

And bear in mind that Mr. Noonan testified that he did this because he felt cheated by Mr. Rodman -- that is another circumstance.

And, finally bear this circumstance in mind, Mr. Noonan knew that Mr. Rodman stood accused by the United States Government in a criminal matter in which it is alleged or was alleged that he had made a cash pay-off in 1972 to a company called Value Line Publications for the purpose of getting an article into that magazine which would, in effect, tout a stock Power Conversion.

Noonan not only knew that Mr. Rodman stood indicted in that case but he knew that Mr. Rodman was going to trial in two weeks. And what else did he know? And what else did Mr.Rodman know?

Mr. Noonan had been down to Mr. Lowe's office and had told Mr. Lowe that in 1974 Bill Rodman admitted to him that he did those acts with which he was charged in that indictment, that he confessed to him. And Mr. Rodman knew -- you heard this from Noonan on the witness stand -- that Mr. Rodman was going to be a witness for the government against Mr. Rodman to testify as to that confession.

Is it logical to believe that Bill Rodman, knowing that this man is about to testify against him in another

kp3

case, is going to voluntarily put him into a position where he can do it again? Is he voluntarily going to put Noonan into an illegal deal?

If Rodman introduced Mr. Noonan to Mr. Rosenberg it could only be for one reason, and that reason was to get Noonan off his back. He didn't want to be buried at that trial.

These are some of the surrounding circumstances. That is below the tip of the iceberg, but that helps you understand the tapes, that helps you to understand Mr. Rodman's involvement.

Now, Mr. Rodman did not try to hide anything on those tapes. He had a bad experience with Noonan once. He owed him money. Noonan said, "You owe me $900," but he said, "I don't know Mr. Rosenberg. I really don't. You know what I mean? I don't."

Well, certainly Mr. Rodman did not want to get involved -- that's one thing -- and I will go one step beyond that. Did he really know Mr.Rosenberg? Did he really know him?

Mr. Rodman wasn't secretive on that tape. He spoke out loud and clear. When Noonan tells Rodman that Rosenberg wants to take off 5 per cent for somebody to do the checks, listen to Rodman's answer: " Well that's your

kp4

business; that's why I said I don't wanna know, I don't wanna know from it; I really don't."

"That's your business." "That's not my business. That's not my business with Rosenberg. That's your business. You wanted this. You pushed for this. It's not my business."

But Noonan says he is worried about getting paid. Rodman says, "I wouldn't, but I mean, again, you know, I don't, I certainly don't want to even be, you know, I don't even want to be considered, you know, I'd love to turn around and know something good happened, you didn't even have to do it."

Does that sound like someone trying to induce Noonan to go into a deal? If Rodman were Mr. Rosenberg's partner in crime, as alleged in that indictment, would he say, "I'd love to turn around and know something good happened, you didn't even have to do it."

And the words 'have to do it' are very relevant -- we'll get back to those words.

There was another word that was said after that. Mr. Lowe and I don't seem to interpret that sentence the same way, and I want you to listen to it carefully.

Did Mr. Rodman say, "Seriously, you don't have to worry about getting paid," or did Mr. Rodman really say,

kp5

"I'd love to know something good happened, you didn't even have to do it." "Seriously" -- "Seriously" -- that's what the tape shows.

Would Rodman say that if he had an interest in the deal?

"I wish you didn't have to do it."

And why did Rodman say "have to" -- "have to do it"?

Now we are going below the tip of the iceberg.

Do you remember Mr. Noonan testified that he went back to work but he didn't have to go back to work for the money. I had asked him that -- and eventually he said, "Yes," you know, he went back to work, and the money wasn't bad.

Remember, he testified that his wife was sick.

Remember, he testified that Rodman owed him $900. Could it be that Mr. Noonan called Mr. Rodman and said, "I need money, I've got to do something. Give me the money you owe me"?

And is it possible, can you infer from everything, from the indictment of Mr. Noonan in Brooklyn that he was really pushing for something other than that money -- pushing for Rodman to give him something with which he could bargain in his mind, something with which he could

kpc

bargain with the people in Brooklyn? Noonan's state of mind -- that is important.

Do you remember in the recording -- and I want you to listen to this -- the one between Mr. Rosenberg and Mr. Noonan, in which he says, "In the beginning, I was just going to do you know, maybe just a couple of thousand here and make a few bucks, right?" -- "a couple of thousand."

That would have earned Noonan a thousand dollars.

He claimed Rodman owed him 900. Do you believe that that was all that Noonan was really looking for? What did Mr. Noonan have with which to force Mr. Rodman to put him in contact with Mr. Rosenberg?

The answer is obvious -- Noonan's pending testimony in the Value Line case.

Remember, Noonan testified that Rodman was gravely concerned about the Value Line case, so we know that they discussed it on the recording, on the telephone.

You can also tell that he was concerned from the recording that was put in evidence. The Court replayed a portion of that recording for you three times, and certain words in that recording were marked by the government stenographers as "Inaudible" -- "Inaudible."

Well, I want you to listen to that part of the

tape again -- listen to that part of the recording again and see if the words that have been marked "Inaudible" are really not the words "in Federal" -- "in Federal."

Rodman said, "So when are you gonna figure out what you're finally doing with this guy in Federal?"

And who was this "guy in Federal"? Mr. Lowe.

And listen to how Noonan answers the question, knowing that this conversation is being recorded and not wanting Mr. Lowe to know that he had been discussing the Value Line case with Mr. Rodman. He says --

MR. LOWE: Your Honor, I have a serious objection to this.

THE COURT: Yes. I don't think it is permissible.

All right.

MR. BERGER: (Continuing) Listen to how Noonan answers a question on the tape. He says, "I don't know, you know, probably tomorrow."

That was the answer to "when are you gonnan figure out what you're finally doing with this guy in Federal?" -- and that, ladies and gentlemen, was the only thing on Bill Rodman's mind -- what was Noonan going to do with this guy in Federal -- the case with which Rodman was greatly concerned.

And how did Noonan know --

MR. LOWE: Your Honor, there is a very serious reason --

THE COURT: No; I will sustain the objection.

MR. BERGER: (Continuing) How did Noonan know that Mr. Rodman was greatly concerned? He testified that Mr. Rodman was greatly concerned about the Value Line matter. Well, if Noonan knew it was because they discussed it. Couldn't you draw the inference from all the surrounding facts that Mr. Noonan was sucking Rodman on to incriminate him, so that Noonan could have something to trade in Brooklyn?

Now Mr. Lowe may say, "Well, if that's true, why didn't Mr. Rodman come to me?"

Well, consider that, going to the government, complaining about a man that you know is going to be a government witness against you in two weeks, who will be testifying that you confessed a crime?

And also, perhaps no matter how loud and how clear Mr. Rodman spoke to the people down in Federal, it may have been "inaudible" -- it may have been "inaudible."

Mr. Lowe said, I believe, "If you find that Mr. Noonan's testimony was not credible, then you have to find the defendants not guilty."

kp9

Well, Mr. Noonan is like an accident-prone plaintiff -- the man who walks down -- a salesman who walks down the stairs of a little old lady's house, and without anything wrong on the stairs or anything, falls down and he is injured, and he immediately brings a case against the little old lady, and she can't understand what she is doing in court and why she has to retain an arrorney, but she does. And this plaintiff is sitting on the witness stand, and the defendant's attorney is trying every way he can to prove that the plaintiff is accident-prone, that there was nothing wrong with the steps, that he just falls all over himself, and try as he may the attorney could not prove it, and in sheer desperation he turns around, goes back to the counsel table and sits down.

With that the plaintiff stands up, crosses his legs, and falls flat on his face.

Ladies and gentlemen of the jury, Mr. Noonan stood up, crossed his legs, and fell flat on his face.

Noonan said, testified, under oath, that he was calling Bill Rodman to get him into a real estate deal, to build a relationship which would be mutually beneficial, perhaps even a partnership. Does that sound credible to you? Does it sound credible that he would be trying to go into a partnership with Bill Rodman, a man he believes cheated him?

He didn't trust Rodman. Would he go into a partnership or a business relationship with him? Was that his reason for calling with regard to a man he said he has animosity towards? Would he go into a business relationship with a man who owed him money and he could not collect it even with a gun? Was that his reason for calling Rodman? Do you believe that he went into a business relationship, or intended to go into a business relationship, and that was his reason for calling, knowing full well that in two weeks he was going to testify as a government witness against Mr. Rodman and tell the jury in that case that Mr. Rodman did exactly that of which he was accused in the indictment? Would a man call up and try to build a

business relationship knowing that that's what he was going to do in two weeks? Is that credible? Can you believe that witness beyond a reasonable doubt? Would you rely upon any testimony he might give you in arriving at a decision which might be the most important decision in your personal life if you knew that that is the way he answered questions under oath?

Noonan's testimony is to why he contacted Bill Rodman is incredible. I'm not saying you should disbelieve Mr. Noonan because he is an informant -- informants can tell the truth; I will not tell you to disbelieve Mr. Noonan because he was convicted of a crime -- because criminals can tell the truth. I am telling you, and I am asking you, to disbelieve Mr. Noonan because he lied to you from the witness stand, that his testimony as to why he started to contact Mr. Rodman is not the truth, that it is incredible.

Do you recall the cross-examination of Mr. Noonan with regard to his December 5 recorded conversation with Mr. Rosenberg? When asked why he asked Rosenberg whether Leon Nash was involved, instead of answering truthfully he answered: Because I didn't want to be near anything he was involved with.

This is at a time he is recording a conversation from the United States Attorney's office: "I didn't want

to be even discussing anything with anybody that had anything to do with Leon Nash."

Was that his reason for asking Mr. Rosenberg, over a recorded conversation, at a time when he knew he was not going to get involved in any deal? Was that a reason for asking if Leon Nash was involved? He wanted to know whether Leon Nash was involved because he was trying to put together a case. Why didn't he tell the truth? Why did he say, "Because if he was I would not even discuss the deal further"?

If he was, he would discuss the deal on a recorded conversation for a week and a half.

Why didn't he tell the truth? I don't know.

These are obvious lies. There is no reason for Noonan, at that point of time, to have been concerned as to why Leon Nash was in that deal other than to get testimony for the government. That's all he had to say to be truthful.

In the conversation with Mr. Rodman that was recorded on December 4, he testified it was the truth when he told Rodman he was worried about getting paid. He was not trying to suck Rodman in. He was relying upon Rodman's judgment of whether he was going to be paid.

These are obvious lies. Noonan was not worried

about getting paid on a deal he was not going to do. This is a recording on December 4, 1975, recorded from the United States Attorney's office, and he said to Mr. Rodman, "I am worried about getting paid."

When I asked him why, he said that instead of being truthful he said, because he was worried about getting paid. What could be a bigger, obvious, lie than that?

If you cannot believe Noonan's testimony beyond a reasonable doubt, the entire government case against Rodman must fall. The tapes standing by themselves do not prove beyond a reasonable doubt that Rodman was Rosenberg's partner as alleged in the indictment.

Finally, why did Mr. Lowe have to remind Mr. Noonan on luncheon recess, while Mr. Noonan was on cross-examination, to tell the truth? Why did he have to remind Mr. Noonan to tell the truth?

I was not going to get into Mr. Sunshine, but while we are discussing credibility I would raise that.

Mr. Sunshine was asked: Why were you using nominee accounts?

He said: Because it was convenient.

So I pressed, and he said, "Because I had credited it."

Ladies and gentlemen, those answers were not true.

Why did Mr. Sunshine lie when I asked him those questions? Why did he give a different answer when Mr. Lowe asked those questions? He was worried about criminal liability in violating the security laws of the United States. Don't you believe he is worried about those violations of the security laws should they be brought up to the Bar Association and him trying to get his suspended license lifted. How can you believe Mr. Sunshine when he testifies one way to defense counsel and another way to the government? He has plenty of opportunity, on cross-examination by defense counsel, to be truthful. You know he was not truthful. How do you know when to believe Mr. Sunshine?

There are certain inferences that can be reasonably drawn from the evidence. One question is this: Why did Mr. Noonan call Mr. Rodman in November of 1975? Well, you know about the felony indictment. You know that he could not get it dismissed. Now you know that on November 20, 1975, Noonan made urgent telephone calls, at least three, maybe as many as five, to my office to get Mr. Rodman's number.

At that time while he was under indictment and while he knew he was about to testify against Mr. Rodman, he was making urgent calls to reach Mr. Rodman.

Mr. Rodman's phone bill is in evidence. His

pgcg

number is 836-0023. Examine that phone bill. See if Mr. Rodman was seeking out Mr. Noonan.

After November 21st, when Mr. Noonan got Mr. Rodman's phone number at home, take a look at Mr. Noonan's phone bill and what do you see?

12-2 Friday, November 21, 8:31 a. m., he calls Rodman; Friday, November 21, 8:52 a. m., he calls Rodman; Saturday, November 22, 7:15 p. m., he calls Rodman; Sunday, November 23, 1:57 p. m., he calls Rodman; Monday, November 24, 7:09 p. m., he calls Rodman; Tuesday, November 25, 2:38 p. m., he calls Rodman; Tuesday, November 25, 7:42 p. m., he calls Rodman; Friday, November 28, 10:44 a. m., he calls Rodman; Friday, November 28, 7:26 p. m., he calls Rodman.

What is really interesting is that on Monday, December 1st, 1975, at 11 minutes after 7 p.m., he calls Rodman at home. You heard certain testimony from Mr. Rodman's wife about that phone call, but what is really interesting is this:

If Mr. Rodman was seeking out Mr. Noonan, wouldn't he have told Mr. Noonan that he would not be home on December 1, 1975, that he was going to Binghamton?

Mr. Noonan called Mr. Rodman's home in Spring Valley at 7:11 p. m. and wanted to speak to Mr. Rodman.

Then, on Wednesday, December 3, 1975, Noonan

makes four more calls to Rodman at Binghamton, the Holiday Inn. Examine Mr. Rodman's phone bill. See if he was trying to get Mr. Noonan to go into a deal.

Would Rodman initiate a deal with a man that was about to testify against him in a federal case, a criminal case?

You heard Mrs. Rodman testify about her call to Bill Rodman the evening of December 1. If Rodman were working on a hot deal for Noonan, would he have gone to Binghamton without telling Noonan that he was going, where he could be reached? If Rodman were Rosenberg's partner, don't you believe that he would have known the price of the stock?

But if you remember Mr. Noonan's testimony, Rodman called Noonan when Noonan called Rodman, and Rodman said, "We will get a price on the stock. I don't know the price on the stock."

Noonan testified that Rodman did not know the price on the stock.

If Rodman were Rosenberg's partner and ready to put away 150,000 shares of stock, wouldn't he have known the price of the stock?

The only reason Rodman spoke to Noonan, Rodman said, "When you are going to figure out what you are finally

pgcg

going to do with this guy -- "

MR. LOWE: Objection, your Honor.

THE COURT: Proceed.

MR. BERGER: Rodman's recorded conversation makes it clear that he was not interested personally in the deal Noonan might have had with Rosenberg. He was not Rosenberg's partner in the deal. If Noonan was to deal with Rosenberg, it was Noonan's deal, and Noonan was to spell it out to Rosenberg.

Do you remember where Rodman says to Noonan, "Spell it out to him; you are not bashful; I have never known you to be bashful"?

If Rodman were Rosenberg's partner, why would Noonan have to speak to Rosenberg? He could speak to his partner to spell out the deal: "Speak to Rosenberg. You are not bashful."

Remember, there was some testimony that Rodman and Rosenberg agreed to pay Mr. Noonan. You didn't hear Mr. Noonan testify that Mr. Rodman was to pay him. The only thing you heard Mr. Noonan testify to was he thought maybe he might have to pay Mr. Rodman. Now if Rodman is Rosenberg's partner and Rodman is supposed to be paying Noonan, or assuring Noonan that Rosenberg is going to pay him, then why would Mr. Noonan thing that he might have

at any time whatsoever was there any meeting

to pay something to Mr. Rodman? And why weren't there any discussions?

Mr. Noonan testified he never worked out an amount that he would have to pay Mr. Rodman. Mr. Rodman never told him he was going to get paid by Mr. Rosenberg. This is a big money deal. Why is it that there was no agreement between Noonan and Rodman? Why is it that Noonan thought he had to pay Rodman?

The government has the burden of proving by credible evidence beyond a reasonable doubt that Rodman and Rosenberg were partners in a scheme to defraud the public as alleged in the indictment. The government has the burden of proving beyond a reasonable doubt each and every element of the crime charged in that particular indictment -- not some other indictment, but the way in that indictment (indicating).

The government has the burden of proving beyond a reasonable doubt not only each and every element of the crime charged in the indictment, but that Rodman acted willfully, voluntarily, with intent to violate the law.

The government has failed to prove, it has failed to meet, its burden of proof. It has failed to prove beyond a reasonable doubt that Rodman and Rosenberg were partners as alleged in the indictment.

The evidence does not prove beyond a reasonable doubt that Rodman was Rosenberg's partner, as alleged in the indictment.

The evidence does not prove beyond a reasonable doubt that Rodman and Rosenberg conspired to inflate the price of Franklin Properties stock as partners in crime.

It does not prove beyond a reasonable doubt that Rodman and Rosenberg agreed to injure the public.

It does not prove beyond a reasonable doubt that Rodman and Rosenberg agreed to sell the stock to the public at inflated prices.

The evidence does not prove beyond a reasonable doubt that Rodman and Rosenberg agreed and intended to use the mail. You heard no evidence that they agreed and intended to use the mail.

The evidence does not prove beyond a reasonable doubt that Rodman acted willfully and voluntarily with intent to violate the law, and the recording of December 4th, 1975 between Rodman and Noonan does not prove beyond a reasonable doubt that Rodman gave Noonan any assurances of the fact that Noonan would get paid. Why would Noonan rely upon Rodman's assurances when Noonan could not even get paid from Rodman with a gun.

After you weigh and evaluate all of the evidence

and the lack of evidence, I am confident that you will find the defendant, Bill Rodman, not guilty.

Thank you.

THE COURT: Mr. Aidala.

MR. AIDALA: Can they stretch for one moment, your Honor?

THE COURT: No. We have had enough stretching.

MR. AIDALA: I realize it is a little difficult for you to sit this length of time. You may move around in your seats.

May it please the court, Judge Gagliardi, Mr. Berger, Mr. Rodman, Mr. Rosenberg, prosecutor Lowe -- and for the moment I am sorry but I forgot your name --

THE COURT: Please proceed.

MR. AIDALA: Madam Foreperson and ladies and gentlemen of the jury:

During my opening remarks I mentioned to you that under our system I had an opportunity to come up and make opening comments to you, and now the la' also provides me with the opportunity of summing up on behalf of my client.

12-3 At the outset, I wan.' to personally thank you for your patience and your diligence and, really, you should be commended because you have assumed a duty which

is essential if the rights of all of us in the courtroom and in our society are to be preserved.

I am sure some of you are aware of it, but it should be brought home that what happens in this courtroom and other courtrooms throughout our country affect the lives of each of us.

If all of us believed that justice is truly to be found in a democracy, then that justice will be best achieved and obtained when all persons alike equally participate and share in the legal process, and that's what all of us here in the courtroom have been doing, that's what each of you have been doing as jurors in this case, and will continue to do. By your function you will assure that justice will, in fact, be attained in our democracy.

T13

Now the attorneys also play a part in our judicial system. And if you are asked, who does Mr. Aidala represent, I am sure that the answer of each of you would be that I represent William Rosenberg. But I think that the effect of my representation of any one particular client extends beyond the mere protection of his rights, because we, through our representatives, have developed that we will not permit any injustice to be done in our system, and therefore we decided that every man who is accused shall be represented by counsel and is entitled to counsel. Counsel will br ng out facts that the prosecutor hasn't brought out. Counsel will point out things that the prosecutor hasn't pointed out.

Counsel will establish things that theprosecution witnesses have attempted to conceal from the jury -- and of course keep in mind Mr. Noonan, who admitted on cross-examination that he had done all within his power to conceal certain facts from the jury, because he believed in his mind that it was to his best interest to do so.

Were it not for the fact that there was counsel representing the defendants, you would not be aware of everything.

Now during a trial we deal with principles of law that have evolved over the centuries, through the

mkp2

experiences that judges have had, that attorneys have had, and the principles I am mainly concerned with are fairness and justice -- and that is the reason for having a jury here; that was the reason why there is a big, huge computer here into which facts are fed and which spew forth some type of verdict -- because it is absolutely essential that people who have had experience in life, who are mature, who can analyze other people, who have had to deal with other people on a daily basis and make a decision as to whether people are telling them the truth, the whole truth and nothing but the truth, or whether they are getting something less than that.

You heard a comment made about a most valuable right, the protection -- the presumption of innocence, and I am sure that Judge Gagliardi will go into greater detail than that; nut again we, through our representatives and our system, say that because a man is accused you shall not form an opinion as to his guilt but,rather, you must assume that he is innocent, because an accusation is not evidence. Anyone can point the finger. Anyone can accuse; that is no evidence -- and that presumption remains throughout the trial. And if you can think in your mind it is as if when you file into the jurybox each one of you was handed a card with instructions on it which said, "Mr.

mkp3

William Rosenberg is innocent, and you are to presume him innocent through the openings, through the testimony, through the closings," and take that card with you into the juryroom, and you keep that card intact unless -- unless you are convinced beyond every reasonable doubt that he is not innocent, and if you are not so convinced then you return to this courtroom with your card intact and hand them up to the Court with your decision to acquit.

Sometimes we are deluded into a belief that we might not need that protection. Well, words get misinterpreted. People who are in fact innocent find themselves accused and find themselves having to stand trial, and sometimes it is only when we lose something that is so valuable that we begin to appreciate its value. It is like the man who is going around complaining because he had holes in his shoes until he saw the other person who had no feet.

I can't impress upon you enough the importance of the rights and the protections that are afforded here in our country to a person accused of crime -- in this case a person who is accused by Kenny Noonan, and I ask each of you to guard those rights as vigorously as I have attempted to do in my part during this trial.

Now, you heard the prosecutor tell you that

mkp4

in our system of justice the prosecutor has the burden of proof, and it never changes, and it is your sworn duty to hold him to that proof, to hold him to that burden, to in effect say to him, "Mr. Prosecutor, if you want me to make one of the most important decisions in my life to assume that responsibility on my shoulder, because it is me, not you who is going to decide it, then you have to convince me beyond any and all doubt" --

MR. LOWE: Your Honor --

THE COURT: Yes.

MR. AIDALA: Your Honor, any reasonable doubt --

THE COURT: I said I would allow a certain amount of leeway on the law. I think you have exceeded it. Now get to the facts.

MR. AIDALA: Keep in mind what I said in my opening -- you don't have to prove your innocence; the burden is on the person who makes the accusation.

Now, we have all known that we have been engaged in a trial, and I do not think everyone has given you a definition of what a trial is. I will give you my definition. I believe a trial is a search for the truth, the whole truth and nothing but the truth. And remember that again when you analyze the testimony of Kenny Noonan, when he admitted to you that he attempted to conceal things from

mkp5

the jury. Remember that when you recall that despite the instruction that was given to Kenny Noonan at one time in the presence of the prosecutor --

MR. LOWE: Objection.

THE COURT: Yes.

MR. AIDALA: Well, unless my recollection is faulty, Ken Noonan testified on cross-examination that when he was a witness testifying on that stand, after he had finished his direct testimony I specifically had requested Judge Gagliardi --

MR. LOWE: Your Honor --

THE COURT: Sustained. It is not in this case.

MR. AIDALA: It is your recollection --

THE COURT: No.

MR. AIDALA: It is your recollection, ladies and gentlemen, that counts, and if you recall that testimony, then you can use it, and if you have any doubts you can have it read back to you and consider that, if you recall it, as having a bearing on whether you are presented with the truth, the whole truth and nothing but the truth.

There is no question, is there, that the prosecutor felt it absolutely necessary to speak to the witness Kenny Noonan while he was on cross-examination.

mkp6

If you recall, he had finished his direct. Mr. Berger was cross-examining him. It was time for the luncheon recess, and in this very courtroom the prosecutor found it necessary to speak to Kenny Noonan about his truthfulness. Why? Was it because the prosecutor then felt that he wanted to have a conversation or was there a good reason? Aren't you entitled to every relevant fact that you need before you base your decision, make a decision that is so important in this case?

Now thecharge in this case you heard Mr. Berger say -- and I will repeat -- is conspiracy. Listen very, very carefully to Judg e Gagliardi's instruction. Listen to every single element that must be proven because if the prosecutor fails to prove but one element beyond a reasonable doubt, then it is your sworn duty to return a verdict of not guilty.

Now the conspiracy that is alleged is that there was an unlawful agreement between these two gentlemen. It is so easy to forget and to say, "Well, there was a conversation between Kenny Noonan and maybe Mr. Rosenberg."

Well, if, for the sake of argument, you were to assume that Mr. Rosenberg had intended to do the worst in the world, together with Kenny Noonan, that is not the conspiracy, that is not what he is charged with.

You will hear that that is not sufficient for the conspiracy, because Kenny Noonan was not a co-conspirator. Don't take my word for it; you listen to Judge Gagliardi and follow his instruction. So even if you felt that Mr. Rosenberg and Mr. Noonan were discussing a possible deal together, Mr. Rosenberg is not guilty of the crime of conspiracy as he stands charged in this case. The conspiracy had to be between Mr. Rodman and Mr. Rosenberg. And ask yourself the question, when all of the alleged facts were known -- remember there was a warrant, an affidavit. Kenny Noonan swore out an affidavit and then Doonan went out and placed Mr. Rosenberg under arrest -- do you recall that?

The evidence also showed that there was no such affidavit, there was no such arrest made of Mr. Rodman. There were no new facts developed after that date. The date of the arrest was December the 8th, but you see there was no legal case of conspiracy at that time, and there is no legal case of conspiracy --

MR. LOWE: I will object to that.

MR. AIDALA: -- at this time. And I submit you will find that out after you hear Judge Gagliardi explain to you the elements, and you ask yourselves the question: Why wasn't Mr. Rodman arrested? Why wasn't there a warrant

for Mr. Rodman's arrest? Because there has to be the two of them. There cannot be any conspiracy between Kenny Noonan and one of them.

And while I am recalling it, remember the incident about the morning when Mr. Rosenberg was arrested, and ask yourself whether you are presented with the truth about the incident about the stock certificates. What type of inference was trying to be created by the prosecutor about those stock certificates that they were Franklin Properties and therefore if Mr. Rosenberg had them there was something wrong? Well, you should analyze it, and after you heard the testimony, those certificates would normally be put inside a safe in the office. It was the weekend. Where was Mr. Rosenberg going when he was placed under arrest? He was on his way into the office. You saw the envelope -- that is in evidence. The envelope indicates it was from California, but it wasn't mailed. What inference can you draw, ladies and gentlemen? You can draw the inference that it had come to Mr. Rosenberg to sell in the normal course of business on the weekend and when he left home to go to work he was bringing it with him to put in the safe, where he would ordinarily do it. If you have any further doubts, remember he was given the warrant. He was told what he was being charged with.

this question? Would you risk a material object that is

mkp9

He was then allowed to be alone with his wife in the car. There was absolutely nothing stopping him at that moment, if he believed that he had done something wrong with that stock, by simply giving it to his wife, telling her, "Dear, put it in your pocket," but he did not do so. He did not do it because there was nothing wrong with his having the stock at that time. But what type of impression was attempted to be created in your mind about those stock certificates? Not only is the conspiracy one which is charged between Mr. Rodman and Mr. Rosenberg -- and again remember it is not Mr. Sunshine and Mr. Rosenberg, it is not what happened in 1974. You'll have the indictment read to you by his Honor, and you'll see that it has to do with November and December of 1975. You can't sit here and convict Kenny Noonan of possession of a weapon.

You can't convict Mr. Sunshine of whatever stock violations he has committed, and you can't convict any other person in this courtroom for something that you may think he did that wasn't proper in 1974.

I submit that was only brought in because the government, the prosecutor realized that he had a weakness insofar as the conspiracy is concerned. I ask you to really keep your eye on the ball, as the expression has been used in the courtroom, and realize what the charges are,

MR. AIDALA: But, ladies and gentlemen, let me

and those are the only charges that you are to consider in this case.

Now again the charge says that these two gentlemen conspired concerning 150,000 shares -- not 1000, not 2000, not 5000, but 150,000 shares. So that in order to find them guilty of the charge you would have to find that on the dates alleged, in November and December, that they agreed to sell together fraudulently at inflated prices approximately 150,000 shares.

When for the first time was 150,000 shares ever mentioned? What date?

When you sift through the evidence you will find that it was not until December the 5th of 1975 that there was any mention made of 150,000 -- and that was in the conversation between Kenny Noonan and M. Rosenberg.

And if you recall, Kenny Noonan said, "You know, at first I was going to do a couple of thousand," and then for the very first time Kenny Noonan mentioned a figure larger than that -- "I've got somebody who is willing to take 30,000" -- and then for the very first time was there any mention made of 150,000.

Now that becomes extremely important because December the 5th was a Friday. Mr. Rosenberg was then arrested on Monday. There is no evidence whatsoever that

at any time whatsoever was there any mention made to Mr. Rodman or by Mr. Rodman to anyone of 150,000 shares; but there is evidence that the very first time that figure was mentioned was on Friday, December the 5th.

And if you were to believe every other element you would still be lacking that prime element that they agreed to dispense with approximately 150,000 shares. They are not charged with 1000, 2000 or 3000, but 150,000 shares. That is why it is so important, that is why the prosecutor has strained so hard at bringing in Sunshine because of that figure of approximately 150,000 shares.

I will ask you also to pay particular attention to one word -- one word that I am sure Judge Gagliardi will mention to you when he explains in his words what "reasonable doubt" means. It is based not only on the evidence but on the lack of evidence. Don't forget that word -- four letters -- the lack of evidence -- what you don't know.

There is mention made of the tip of the iceberg. What is there that you haven't been told? What evidence exists that you are not aware of and that you should be aware of and should be entitled to be aware of before making this decision? If there is a lack of evidence, then your reasonable doubt can be based on that lack of

mp12

evidence as well as being based on any evidence in this case.

I am going to point something else out to you. In determining something that is very important, it is the intent, the state of mind that an individual, because Mr. Rosenberg could have said all the words, but it is his intent that counts.

I just used the analogy, Kenny Noonan said all those words, but he admits his intent was not what the words appeared to be, nor what they appeared to say.

Now, there is a clue to the tape-recording between Mr. Rosenberg and Kenny Noonan that I say will point out to you that Mr. Rosenberg, who is an experienced man in the field, did not intend to go into a scheme even with Kenny Noonan, but rather that his intent was something other than that. I think you have heard argument about that already, but what I am going to point out is this, you heard that there is a competitive market amongst broker-dealers. That means there are other brokers in the field. That means that Mr. Marcus, for example, is a broker. It means, as you heard the testimony, if somebody is putting orders in, that various brokerage houses are called and asked, "What is your price? What is your price? What is your price?"

Now we could talk all day about a fictitious, crooked clerk. There is no such person, and as I developed on cross-examination, the assumption is that there isn't.

Now what it means is this, there was a condition put into the discussion, that condition being that you had to direct everything to John Maher, that you would have to direct 150,000 shares -- orders for that amount to John Maher. Could it be done in a competitive market? I submit to you that the evidence shows that it could not be done.

Now, there were no crooked clerks. What other controls existed within the company that Ken Noonan worked for that would prevent that? I asked that question. It was objected to, and unfortunately it was sustained, and so I guess I can't argue it --

MR. LOWE: Your Honor --

THE COURT: If it is something that you can't argue, Mr. Aidala, don't go into it.

MR. AIDALA: Well, I submit to you that by virtue of the condition that preceded any alleged agreement between Rosenberg and Noonan -- not Rod[illegible] -- it was the same as if I would say to you, "Ladies and gentlemen, I'll give you a million dollars, just open your arms, flap your

mp14

arms, fly around the room three times and you will have a million dollars."

There is no question that by virtue of my imposing -- asserting a condition which is impossible to be done, that it indicates or should indicate to you that I have no intention whatsoever of giving you a million dollars.

And I submit to you that I think Kenny Noonan realized that, figured it out and realized that he was just being delayed -- and don't forget the dates. The prosecutor did not mention in his summation the fact that Rosenberg was arrested on December the 8th, and exactly one week from that date the trial was to start involving Mr. Noonan and Mr. Rodman. Is that a mere coincidence or is it the tip of the iceberg? You have heard comments made about Kenny Noonan -- the case revolves around him. He is the nucleus of the case, he is the source of the case. It is like a rock being thrown in the lake; where it lands it makes a big splash, but that is not the only effect. It makes ripples, too.

Well, Kenny Noonan and his motivation and his intent may be the big splash, but the ripples extended far out --far out to even reach you, myself, and because of him, because of his condition, because of the situation

that he found himself in, we find ourselves together today in this courtroom.

There is something that I should mention -- and that is that people who will read this transcript perhaps will not be able to appreciate as we do, and that is the demeanor of the witness on the stand -- that is, oh, so important!

You ask yourselves what that demeanor was. You ask yourselves whether you felt there was a lack of complete candor by the witness, whether he told you the truth, which was nothing but the truth.

Now it is also important for you to analyze his state of mind at the end of 1975, to determine what his intent was, what caused him to do what he did. Let us not forget that felony gun case in Brooklyn -- a most serious matter -- he was aware it was serious, a matter that I think you have heard and learned today, that his motion to dismiss had been denied -- he was to go to trial on it, on which he faced substantial imprisonment if convicted.

In addition to which there were the possible charges as a result of his having used a gun against Mr. Rodman.

In addition to those two things there are other things. Do you recall he admitted having taken the fifth amendment when asked about crimes of extortion and then he changed and testified, "I had nothing to worry about"? I think it was March 16th when he took the fifth amendment when asked whether he ever committed crimes of extortion. The testimony here was that he was concerned as early as March 16th of this year about what acts he had done which might cause him to be incriminated for crimes of extortion. Well, I think you can draw a logical inference if he was concerned as to possible crimes of extortion as recently as March 16th of this year and certainly in the end of November and early December of 1975 he was concerned about those acts also.

What were they? I don't know. You don't know.

But did they have an affect on his course of action? I submit there should be no doubt but that they did. He was a knowledgeable individual. He hasknown how to protect himself. I told you what I thought my opening evidence would show. He was a bargain hunter, a shopper; he learned you have to trade off. He has managed to stay

out of prison, and he admitted finally that when he went to the United States Attorney's office he hoped in his mind to get help with his Brooklyn case. That's what was in his mind when he went to the United States Attorney's office for the first time. His state of mind is extremely important, the belief he had, the belief that was necessary for him to have something, to be able to come up and bargain and say, "Look, I think I got something good. I hope you are going to do something for me on my matter."

Well, that intent on his part was so strong, so overriding, that he was able to get some other governmental agency to do what the United States Attorney's office would not do: Intervene, and he got his felony case in Brooklyn dismissed.

I don't know what he did. You don't know what he did in order to get that done. We don't know who intervened. He attempted to conceal that fact while under oath from a jury.

How was it discovered, ladies and gentlemen? It was discovered, if you recall, on my cross-examination by my having gone one day to the Supreme Court in Brookly and, as a result of that, we found out and discovered that another governmental agency had intervened on his behalf and got the case dismissed.

What else don't you know about Kenny Noonan? Keep in mind the lack of evidence as a basis for a reasonable doubt.

Certainly he has done well for himself. Do you think that it was a mere coincidence that he began to work for that brokerage house, Leyner, Dreskin, just prior to this incident occurring? And another mere coincidence that when Mr. Rosenberg was arrested he left the company? Was that his sole reason to go there, what he testified to, to make money?

"What money did you make?"

"It was minuscule."

Was he using that as some type of a front, a front to enable him to do what he thought would be best for his own interest?

Do you remember the cross-examination about his taped conversations? Ask yourselves, those things he is lying about, why was he lying about them on there? Wasn't he trying to make the tapes sound as bad as possible? The government conceded that when, for example, he said, "You know, Billy and I, we used to exchange money," there is not a shred of proof to that. The prosecutor concedes that. That was made up. You didn't know about that concession. You would think that there had been some prior dealings

pgcg

and there was money being passed. You know now, there is no issue about it, that that was a lie.

The same thing about the company. It is a good company. "By the way, that fellow, that imaginary fellow who is going to pay the 30,000, he knows it's a stiff." There was nothing said about "the stiff." He put it in there. Why? The more he indicates on that tape, the more it sounds bad, the better off it is for him. He is doing what he thinks the prosecutor wants him to do,and he will benefit in the end for doing it.

Keep in mind one thing, as has been pointed out to you: None of us are witnesses. The prosecutor is not a witness; he can't vouch for the truth, credibility, of the witnesses he calls to the stand, and simply because the prosecutor calls someone to the stand doesn't mean that he believes that witness' testimony. I have already discussed the necessity for the prosecutor to speak to Mr. Noonan while he was still being cross-examined.

I submit to you, ladies and gentlemen, that if you find that a witness who has testified has lied to you about one material thing, you have the absolute right to reject that witness' entire testimony and to say, "Mr. Witness, in essence, you didn't level with us, you didn't tell us the truth and nothing but the truth, and I am not

going to be responsible for trying to decide what you told us that may be true or not."

You can reject all of his testimony, part of it, or some of it.

In deciding who is initiating what happened here remember the urgency, remember who is the moving force, remember when Kenny Noonan kept calling not only Mr. Rodman but then kept calling Mr.Rosenberg. He called Mr. Rosenberg. Mr. Rosenberg was not there. Remember, late in the day, Arthur Pendrick testified to: "What's his phone number? I thought he would be there."

He calls up his home at night and Mr. Rosenberg is not there. He can't understand.

He calls the following morning and he tells Mr. Pendrick, "I called him the night before. Have you heard from him yet? He was not at home."

Does that sound like Mr. Rosenberg is waiting around to hear from Kenny Noonan to do this big deal, or does it indicate to you that Mr. Rosenberg was making himself a little scarce and that Kenny Noonan had the absolute urgency to contact Mr. Rosenberg? And why so urgent? Don't forget, December 15 was the date the trial was to begin against Mr. Rodman, and now we are talking about December 5; Mr. Rosenberg was arrested on December 8. It is not a

mere coincidence, ladies and gentlemen.

I am now going to pose a question that I ask each of you to ask yourselves when you go into that jury-room, and it is this: If Mr. Rosenberg had any real intent to sell 150,000 shares, wasn't there one simple way to find out? On that Friday, why not have called in an order, called in that order for 30,000 shares and said, "Here it is." Then if there was a true inten a confirmation would have been sent out and then there would have been proof positive of the intent to go through with it. The very fact that that very simple elementary step was not taken, I submit to you, is proof that there was no intent to go through with it; and the fact that there was no intent was well known. No member of the public could be heard. That
14-2 individual was an imaginary individual that Kenny Noonan made up. You will hear that there are no other co-conspirators --

THE COURT: You are infringing upon my function and you were describing the law completely in error. I urged you at the beginning, all of you, not to do into the law. When you go into the law anddescribe it erroneously I have to correct you. The success or lack of success of a conspiracy is of no consequence. I will so charge in connection with my main charge.

THE COURT: That's not in this transcript and

MR. AIDALA: I am not directing myargument to that. I am directing it to your necessity for having to determine the state of mind of Mr. Rosenberg, and it is extremely, extremely, pertinent in describing whether a man intended to do it if he imposes a condition and makes it impossible. There is a condition and I only ask you to consider that on the question of his state of mind and his intent.

Ask the question: Why wasn't that false order submitted?

Kenny Noonan is an informant. There is no question about that. There is a danger, a very real danger, because in order to maintain his status he must create, he must convince, he must convince that he has something. If he doesn't convince that he has something he is not worth anything and he doesn't stay out of jail.

When you consider Kenny Noonan and when you consider Sunshine I am going to ask you to do something. There must be something of personal value to each of you, whether it is a house that you have, maybe you have a business, maybe you have a license to run that business, and the license has cost you an enormous amount of money, maybe you have saved up money to send a child to school -- think of something you feel is valuable and ask yourself

this question. Would you risk a material object that is personal to you on the gamble that you have been told the truth, the whole truth, and nothing but the truth from the witnesses, and if you are wrong you lose it all? Because if you are not willing to risk that on something that is really material and personal to yourself, then I submit you cannot risk it when a man's liberty is at stake. Remember, you only need by one reasonable doubt.

It is not only the evidence, but what a witness refuses to tell you, what a witness hides from you, that lack of evidence also can constitute a reasonable doubt.

If Kenny Noonan was the beginning of this incident, Robert Sunshine was truly the end.

I suppose every profession has a Robert Sunshine, and I suppose I could say that we could really point to him as being a pitiful soul, except for one fact, and that fact is that he too is someone who would say what he thinks will save his own neck.

You had an opportunity to observe his demeanor. He says he is not disbarred but has only been suspended for 15 years. I don't know what the difference is.

THE COURT: He said what it was. Thereis a difference. The testimony in this case indicates that he was suspended.

THE COURT: It is noted and also overruled.

MR. AIDALA: But,ladies and gentlemen, let me point out to you that simply because a witness says something doesn't mean you have to accept what he says.

THE COURT: But you cannot accept the opposite. I told the jury that in connection with questions asked, and so forth.

You are flying in the face of my instructions.

MR. AIDALA: I submit, you use your common sense, your logic, your experiences in life, because that's why you are here as jurors, to use those in deciding the facts in this case. You saw his demeanor, his evasiveness. As a matter of fact, I submit he lied on the stand when Mr. Berger was cross-examining him after his intent for having those nominee accounts. He gave Mr. Berger one answer, and then later on in his testimony it turned out that that was not the truth, that there were other reasons, he was concerned with the securities laws, possible violations by doing what he did.

Do you remember how he was the man who was, I think, angered that the company was now moving east. The easterners were taking over; the New Yorkers were going to be in control. He had not done anything of any great significance in a while. I submit to you he was resentful about that fact.

Ask yourselves what your first impression was after you heard him testify on direct examination about the number of shares that he sent to John Maher. Remember? It was in excess of 200 and some-odd-thousand. Would you have not believed at this point that John Maher had, around December of 1975, in excess of 200,000 shares of stock?

MR. LOWE: Your Honor --

THE COURT: It is the jury's recollection of the testimony that controls.

MR. AIDALA: What is the meaningful figure? The meaningful figure is what amount of stock was in John Maher or what amount of stock Mr. Rosenberg had in December of 1975. The government put on its witness to testify to that, one of the first witnesses, the person who kept the books, and that person testified to the effect that in December of 1975 John Maher had 7,000 shares of Franklin Properties. Nowhere, nowhere near 150,000; certainly nowhere near a quarter of a million shares, as Mr. Sunshine would have led you to believe in the beginning.

After I went through some tedious type of cross-examination I think it developed that what was happening was that shares were being sent to John Maher and they were being sold, so that John Maher did not have those shares, and I don't know what the arithmetic was,

pgcg

but I submit if you go through it, even accepting the figures that Mr. Sunshine gave you, you will find out that nowhere were there 150,000 shares in John Maher. The evidence discloses that in 1975, and especially before November and December of 1975, John Maher was divesting itself of its shares of Franklin Properties. In other words, it was selling or returning the shares. It was not accumulating as the charge alleges in the indictment.

MR. LOWE: The charge does not allege that John Maher was accumulating.

THE COURT: Yes.

MR. AIDALA: You will hear the indictment. You will hear that in approximately December of 1975 William Rosenberg is accused of having accumulated 150,000 shares of stock.

THE COURT: The indictment is nothing more than an accusation, and the indictment specifically says he tried to unload 150,000 shares of stock on the unsuspecting public. That's what is claimed as the object of the conspiracy.

Members of the jury, an indictment is not evidence.

MR. AIDALA: Based on the evidence you will see that in 1975, instead of accumulating what was being done

explaining to the jury that simply because an attorney

was that the stock was being gotten rid of, it was being divested. Even Mr. Sunshine testified that in the fall of 1975, 80,000 to 90,000 shares were returned to him. Is that the type of act of someone who is charged with accumulating so that he could sell at an inflated price?

14-3 Nominee accounts? Those accounts Mr. Sunshine admitted were his accounts, the stocks were his stocks; however, he, for his own purposes, used other names. There can be a number of reasons. Your imagination could think of any other reason you want to as to why any particular individual may want to use a nominee account. Mr. Sunshine had his reason. Other people have other reasons. There could be reasons to avoid people knowing what you are doing. Maybe your wife doesn't want her husband what she is doing.

Weigh carefully even the testimony of the witnesses who were put on here who said, "Yes, I never received anything at my address in that name." I say to you weigh carefully that testimony because if any of those witnesses had been asked to do a favor by a friend, to accept those envelopes that were sent and now that witness is suddenly confronted by the United States Attorney's office, does it abuse your common sense that the witness would deny that he ever received it?

comment on it. It is highly

I point out Michael Scott. There was an address, the records of John Maher show that stock that was sold was sent to that address, or money, checks were sent to that address. The man got on the stand and said, "I don't know anything about it." Would it not have been better to hand the regular postman who was delivering during that period of time testify as to whether there was ever any envelopes addressed to Michael Scott at this address?

I say weigh carefully even the testimony of those individuals.

One other of those individuals whom I recall now, remember, he said he had nothing to do with John Maher, but when I questioned him on cross-examination he said he had found out who had used his name and it was, I think, a friend of his; and I asked him, "Was it Mr. Rosenberg?"

And he said, "No."

Well, the point is that there are people who will use other person's names and you can't jump to the conclusion that it is Mr. Rosenberg's account. There is one specific situation where the witness admitted that he found out who was using his name and that it was not Mr. Rosenberg.

I am going to approach the end of my summation. This would be the last opportunity for me to

pgcg

address you during the trial. The prosecutor under this system has an opportunity to rebut, to get up to answer what I say. I am going to ask each of you to do yourselves a certain favor. If there is something that the prosecutor says, if he argues to you in a certain way, would you please ask yourselves, "What might Mr. Aidala have said about that?" Because the only fair way you can analyze is by balancing. I cannot do it. I ask you to do it for me.

During his Honor's charge we must remain silent.

With each word I speak my role decreases in this trial and your role increases.

I felt that it was an honor to be part of this trial and act as an attorney in this legal proceeding. As I indicted to you, I hope in some way I have not only preserved Mr. Rosenberg's rights but the rights of everyone, and I hope that the sense of fairness that is required in your society will prevail during your jury deliberations.

After his Honor charges you tomorrow you will receive the case and, quite frankly, I don't envy your responsibility.

I will never be, I am sure, in the position of being a juror. I really wonder, since the day you swore, you took an oath to be a juror, whether each of you has seriously thought of the responsibility that you took onto

yourselves. It is a responsibility to judge your fellow man.

In this case, with respect to Mr. Rosenberg, a man who is in his later years, you have a responsibility to decide the facts against him.

Please, don't lower yourselves into a false sense of security in thinking it could never be you or one of yours. A couple of weeks ago I ran across a political cartoon which I really is on point in this case.

Two gentlemen in Washington, dressed very severely, are walking along, and one gentleman says to the other, "This will make Watergate look like a picnic." And he continues. He says, "You know the Cherry Tree that Washington cut down? Everyone has always assumed it was an isolated incident, but get this: Since that time there has been an estimated 50 million cherry trees cut down. What does that suggest to you?"

And the second gentleman said, "A conspiracy."

The fourth fellow continues and says, "Here's the clincher: 'Cherry' and 'Oswald' both have six letters."

It is funny to read, but it is not really funny when you realize it can happen, that someone can take facts and someone can go back to 1974 and throw figures at you and say, "You know what that means? It means it's a

conspiracy, and you know what, Rodman, Noonan, and Doonan, all have six letters."

That's all there is here. There is an insufficiency of evidence to make the case out. You have a duty which his Honor will impress upon you. I ask you to follow that duty.

The responsibility is yours alone. You cannot blame anyone else. You cannot point to the prosecutor and say, "Well, it is his fault." He cannot make the decision, only you can.

There is a story told of our late President Truman, of his having on his desk in the White House a sign that said, "The buck stops here." Ladies and gentlemen, there is no doubt about it, the buck eventually gets to you, and the responsibility is on your shoulders alone, and no one can question your decision, not the judge, not the prosecutor, no one. I only suggest to you that you act in as fair a manner as you would wish jurors to act if, heaven forbid, yourselves or a loved one happened to be accused and sits where Mr. Rosenberg sits.

Keep in mind your obligations to abide by your conscience. Even though you might be out numbered, you have an obligation to abide by your conscience. Consider the charges, consider the fact that 150,000 shares were not

could have called Mr. Noonan from

mentioned Friday, December 5. Why wasn't that one order put in to test the true intent of Mr. Rosenberg? Ask yourselves that.

In his first inaugural address President Lincoln stated: "Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world."

You are representatives of the people of your community; you are the hope for us and the hope for our system in our society.

14-4 Therefore, ladies and gentlemen, on behalf of Mr. Rosenberg and in the interest of our society, in the interest of justice, I ask you to return to this courtroom with a verdict of acquittal.

I thank you.

THE COURT: Our time table has gone completely askew. Would you prefer to wait for the morning? How many would prefer to wait until the morning for Mr. Lowe's rebuttal?

(The jurors nodded affirmatively.)

THE COURT: We have not heard everything. Don't discuss the case overnight.

Is there any objection to being in here at 9 o'clock? Is there a difficulty about it? Does anybody have

any difficulty in trying to get here at 9 o'clock in the morning?

All right, I will expect you in here at 9 o'clock in the morning and the case will go to you before lunch.

(Jury excused.)

MR. LOWE: Your Honor, I have two applications based upon the summations.

One application is based on Mr. Berger's summation and one on Mr. Aidala's summation.

On Mr. Berger's summation I have never heard something that struck me as quite unethical. Mr. Berger has been in possession of the entire tape of the conversation between Mr. Rodman and Mr. Noonan that was taken on December 4, 1975. Mr. Berger knows that there was reference to the case on that tape, the December value-line case. Mr. Berger knows there was reference to me specifically on that tape.

Mr. Berger, if you are going to deny it I will make you take an oath to it because I know what is there. There was a conversation wherein Mr. Rodman said to Mr. Noonan, "I was downtown with my friend, downtown today, giving samples of my handwriting. It is really a pain in the ass, this trial coming up."

I am "the friend downtown" because on that very

day Mr. Rodman was in my office giving samples of his handwriting having to do with the other case he was tried for last year.

I also submit that in that light to argue to this jury that the expression "in" or "at federal" referred to me and referred to that case is an absolute --

Mr. Rodman, I heard you say that there was no question about it. If you have evidence, you get up on the stand and give it.

I think it is disgraceful for Mr. Berger to make an argument that is contradictory to known fact, a fact that has been in his possession, the same that has been in his possession, and I think that's an outrage.

Before I get off the subject, let me say that Mr. Aidala made a point --

MR. BERGER: I would like to have this one answered before he goes on to Mr. Aidala.

I would like to know in clear, concise, fashion what part of my closing argument seems to disturb Mr. Lowe so greatly when I recall coming into court and the judge, this court, displaying to the jury that part of the transcript which supposedly had the inaudible part, and I have simply stated to the jury, and I was told by this court that I could so argue, that the inaudible words are "in

federal" or "at federal" --

THE COURT: "Ah federal" or er federal."

MR. BERGER: I have had 30 people listen to it and they all say "in" or "at federal." I have it here.

MR. LOWE: I am not objecting to that. I am saying the conclusion that Mr. Rodman is talking about me is not warranted in light of the way Mr. Rodman characterized me earlier in the same case, in a portion that was not played to the jury, but which Mr. Berger was well aware of.

MR. BERGER: Mr. Rodman said in that tape that he was down and gave handwriting exemplars, et cetera, but the question asked on that tape, the part that was heard by the jury and will be heard by the jury is, "When are you going to know what you are going to do with that guy in or at federal?" Doesn't the jury have a right to assume or infer that the man in federal is Mr. Lowe?

THE COURT: No, it does not.

MR. LOWE: Not when the facts are different.

THE COURT: Not on the basis of anything contained in this transcript.

MR. BERGER: What about the fact that Mr. Noonan testified on the witness stand that Mr. Rodman was gravely concerned about the value-line case, that they had discussed the value-line case?

THE COURT: That's not in this transcript and that's what you are referring to. If you had wanted to put the three minutes and twenty seconds of unrelated conversation in there or thought it belonged in there you could have done so. I don't think the comments had anything to do with what is in the transcript. You have a perfect right to argue that the inaudible is not so and it says whatever you say, but I don't think you had a right to say anything else.

Is there anything you want to do to correct it in any way, Mr. Lowe? You can comment in any way that --

MR. LOWE: I would almost like to play the rest of the tape.

THE COURT: You have a right to argue.

MR. LOWE: I will answer the argument.

THE COURT: That's all that is necessary.

MR. LOWE: I have a real problem with the other one because of this. Mr. Aidala stated, and I quote, "Just because the prosecutor o me personally, whichever doesn't matter, put the witness on the stand, doesn't mean you believe him."

That seems to me to be a terribly unfair comment, your Honor, in light of the fact that I obviously cannot get up and say, "Yes, ladies and gentl men, I do believe

him."

But I think that --

THE COURT: Sometimes an improper comment calls for a response by itself which would not be proper. There are many cases in the circuit that say that it is proper comment to comment.

MR. LOWE: I have nothing further to say.

THE COURT: I will expect you all here at 9:30.

I mean, proper comment may properly be responded to.

MR. AIDALA: May I state, your Honor, Mr. Berger specifically asked the court whether this court had intentions of having all summations heard by the conclusion of today. It was approximately, I think, a quarter after six and it was fully expected that any rebuttal by the prosecutor would be brief. Your Honor changed his mind.

THE COURT: I certainly did. I have done that before and I have no problem with that.

MR. AIDALA: I would like to state for the record I do object to the prosecutor being able to rebut tomorrow morning.

THE COURT: Your objection is noted on the record and it is overruled.

MR. BERGER: I join in that objection.

THE COURT: It is noted and also overruled.

I told you in the last trial not to cover the same ground that was covered by your predecessor. There could have been a certain way to have been a lot more concise, a lot less rambling, a lot less encroaching upon the function of the court, which is to instructthe law. I feel there was a lot of room for more objections. If taken the objections would have been sustained. But I am not going to have the jury stay for another 25 or 30 minutes to hear rebuttal.

Court is adjourned until tomorrow morning at 9 o'clock.

- - -

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Robert Sunshine	460	477	518	535
Elaine Winter	549	552		
Rosemary Rodman	553			

EXHIBIT INDEX

Defendant Rodman	Identification	In Evidence
C, D		561

kmpl

UNITED STATES OF AMERICA
vs.
WILLIAM RODMAN and
WILLIAM ROSENBERG.

76 Cr. 43

New York, March 30, 1976.

Trial resumed.

- -

(The following occurred in the absence of the jury.)

MR. LOWE: Your Honor, I just wanted to hand up a brief additional request to charge in this case. I have given copies of it to defense counsel (handing).

THE COURT: Is there any comment, gentlemen?

MR. AIDALA: Judge, my understanding of the law is that simply because one party happens to call a witness the jury should not and cannot draw an inference that the party that calls the witness has a personal belief as to that witness, and any remark I made in my summation alluded to what my understanding of the law is.

Now if I am incorrect and if the jury can draw an inference by virtue of the fact that a particular attorney calls a witness, that that attorney believes that witness, then I am wrong and your Honor could explain what your Honor believes what the law is.

If I am correct as to my understanding of the law,

then I certainly would have no objection to your Honor explaining to the jury that simply because an attorney calls a witness to the stand they are not to draw any inference as to any personal beliefs that attorney has by virtue of his calling him.

MR. BERGER: Your Honor, I can understand the problem that Mr. Lowe is having on a particular statement by Mr. Aidala.

As I heard the closing argument, I don't believe it was intended that Mr. Lowe called a witness whom he did not believe at the time he interviewed him. He may have believed him and probably did believe him or else he would not have called him -- as long as Mr. Lowe is not going to call a witness that he disbelieves and put him on the stand and feel that he is not telling the truth, but the fact that a witness is on the stand and is cross-examined, the fact that he has been called by one attorney or another does not mean that the attorney that called him believes what he has testified to, because he has testified to subjects, perhaps, that were not even covered in the original interview by the attorney that called him. That is the reason for the rule that the fact that the witness is called does not mean that the attorney that called him believes his testimony.

THE COURT: There should not have been any comment on it. It is highly improper, and it is going to be corrected.

Will you see if all the jurors are here?

THE CLERK: Yes.

(The clerk leaves the courtroom.)

MR. BERGER: May it please the Court, the thing that disturbs me -- and perhaps I was wrong in my closing argument --

THE COURT: There has been a lot done on the part of both defense counsel, both in this trial and the previous trial. I don't know what we can do about it, but I certainly thing we ought to do something about it, and I think there ought to be a lot more done in connection with counsel in these cases coming in here and behaving in the manner in which certain counsel have behaved. I don't know what to do about it. I am really surprised and discouraged sometimes when there is no action taken at all, and I don't know when it can be expected to take that action. I will certainly make my position known at the next meeting of the judges. When the prosecutor steps over the bounds of propriety, the Court of Appeals dismisses, or even the trial judge dismisses the indictment. If defense counsel come in here and behave the way they have, I think it is

a disgrace and a usurpation of their right to practice law in a lot of cases. I just cannot understand it, but I am certainly not going to sit here and continue without at least making an effort to do something about it.

MR. BERGER: Your Honor, I had made a statement to the jury that the fact that when Mr. Noonan was testifying the government does not vouch for his veracity -- is that improper? The government does not call --

MR. LOWE: I have not raised any objection to that statement by Mr. Berger. There was a slightly different intonation and inference to be drawn from the other one. I think it is an inference that has been created throughout this trial, but there has been government impropriety right and left, without any evidence at all.

THE COURT: I do not think we have to discuss this matter any further at this time.

Mr. Lowe has presented a request to charge. I have asked for your comments on it. I have received your comments, and I will charge according to what I think is proper.

MR. BERGER: Your Honor, may I make one request with regard to Mr. Lowe's requests to charge, outside, of course, of the fact that I except to it -- that just because the prosecutor calls a witness doesnot mean that hebelieves

him, nor does either attorney for the government or the defendant vouch for the truth or veracity of a witness.

THE COURT: I am not going to charge in exactly these words, but I am going to charge what I think is correct under the circumstances.

Are all the jurors here now?

THE CLERK: No, a few are missing.

THE COURT: How long do you expect to take, Mr. Lowe?

MR. LOWE: Well, your Honor, I have three pages of notes. I hope it should not take me longer than 15 minutes.

THE COURT: Do you have the indictment with the elimination of the co-conspirators in it?

MR. LOWE: I am not sure -- I will check.

(Mr. Lowe examines.)

MR. LOWE: Yes.

THE COURT: All right, show it to counsel.

MR. LOWE: This is the same one from the last trial.

THE COURT: All right, let counsel look at it.

(Handed to defense counsel.)

THE CLERK: The jury are all here.

(Jury in box.)

THE COURT: All right, Mr. Lowe.

MR. LOWE: Thank you, your Honor.

Ladies and gentlemen, as I sat and listened to the defense counsel's summations at the end of the day yesterday I was reminded of a remark written some years ago by Mark Twain, and that remark was -- I am not sure I am quoting it exactly accurately, but it was to this effect: Mark Twain wrote that thunder is loud and thunder is impressive but it is the lightning that does the work.

The same, ladies and gentlemen, is true of any case on trial. Talk can be loud; talk can be impressive; talk can sometimes serve to distract, but it is not the talk, ladies and gentlemen, that does the work; it is the evidence. The evidence, ladies and gentlemen, is the lightning, not the talk. The talk is the thunder. It is the evidence on which the government asks you to rely when you consider the verdict that you will return in this case -- not the talk.

Mr. Rodman's counsel demonstrated to you, when he spoke to you, that Mr. Rodman's phone bills don't show any telephone calls to Mr. Noonan, and he suggested that you can conclude from that that Rodman did not call Mr. Noonan. I will suggest to you two things about that, one of which is this: There are a lot of telephones in the

United States, ladies and gentlemen, and Mr. Rodman certainly could have called Mr. Noonan from any number of phones, and they will not show up on his home phone bill.

Let me point out to you something which may be even more significant in that regard, and that is Mr. Noonan's phone bill.

Mr. Rosenberg's attorney made a big point of the number of telephone calls that were made from Mr. Noonan's home to Mr. Rodman, and indeed there are many. However, there is something very interesting. If you carefully examine Government's Exhibit 2, which is a photocopy of two pages of Mr. Noonan's bill from November 21st to December 15th of 1975, you will find the following -- and in particular you will find it on the critical date, December the 3rd, 1975. There are for December 3rd in the early afternoon recorded three telephone calls between Noonan's home phone and that Holiday Inn in Binghampton, New York. There is something very interesting about that, ladies and gentlemen; these three in the early afternoon -- two of them are listed as Binghampton, New York, a number, and the amount of money, the number of minutes and the time of the call recorded in four digits. One of them, ladies and gentlemen, is listed a little bit differently. Instead of spelling "Binghampton" out, it abbreviates it. Instead

of putting in the "NY" immediately after that, it is moved a little to the right, and instead of a four-digit time there is only two digits representing the hour, and after it is another number -- what appears to be a serial number of some sort.

You might conclude from that, ladies and gentlemen, that that represents a different kind of a call.

Do you remember what Noonan's testimony was? Rodman called him and told him to go to a safe phone to call him back, and then he waited a while and he called him back on his own home phone, and during the course of that conversation Rodman told him to check the market and call him back, and that he did that and called Rodman back.

What we have, ladies and gentlemen, is this differently listed telephone call some time between 12 and 1 o'clock, because the hour digit shows "12."

You might conclude that that is a call that is on Noonan's bill but because it is listed differently you might conclude that it was a call made to him and charged to him.

The next call that shows up is at 24 minutes after 1, and that is listed in the same way as all the other calls from Noonan to that Holiday Inn -- excuse me, 19 minutes after 1, and then there is a third call at 24

kp9

minutes after 1.

Kenny Noonan may not have been so trustworthy on his own, ladies and gentlemen, but he cannot make up those phone numbers -- and that is why I am talking about the lightning! They say regardless of whatever any witness says.

There was also a fair amount of thunder about the 130,000 shares. Remember a number of things about that, and No. 1 is, who is the one who mentioned the 150,000 shares on the tape? It was Mr. Rosenberg. And what did he say? "I have accumulated approximately 150,000 shares."

That by itself, ladies and gentlemen, is enough for you to reasonably believe that that is the balance -- because why would he say that if it wasn't so? But it is all there in the records, too.

Mr. Rosenberg's attorney may not like the arithmetic, but it is there, and the arithmetic shows, when you get all done counting up the nominees and where the stock is being sold, that there is more than 150,000 shares available to Mr. Rosenberg, including the 5000 shares he had on him on the morning of December the 8th.

An argument was made to you that that was the first time that 150,000 shares was mentioned. That was

kp10

the first time the evidence shows that it was mentioned to Mr. Noonan, and it does not mean that it was the first time that it was mentioned.

Another argument was made, for example, about this guy Michael Scott -- why didn't we call in the regular mailman to testify, because isn't it natural that somebody might lie about whether they were getting mail for a friend?

First of all, ladies and gentlemen, remember this, those people have come in here and testified and did so -- they got up on the stand, they took an oath, and they subjected themselves to cross-examination. And you have seen in this case how embarrassing and unpleasant cross-examination can be. You have to get all kinds of background about what they have done in the past and that kind of stuff. Do you think those people would be willing to come up and lie under oath about a simple thing about whether they got some mail for a friend? Doesn't that really fly right in the face of your common sense? Would you do it?

But we do not need to just rely on Mr. Protas saying he never got any mail from Mr. Scott. He said it -- and indeed there is nothing in the evidence to indicate that he was not telling the truth. But don't forget, there were checks written to Mr. Scott on the account of

John Maher Associates, and those checks were signed by Mr. Rosenberg. And what do we know about those checks? Did they get sent out to Mr. Scott? No. They got paid into that check cashier by Mr. Rosenberg, and the check cashier gave Mr.Rosenberg the cash.

Don't you suppose if there were a real life Scott that the checks would have gone to him and he would have gotten them instead of Mr. Rosenberg getting the cash, chopping off the 2 per cent fee for doing the job of cashing?

And, finally Mr. Rosenberg's counsel told you what he recalled the evidence to be, and he mentioned some witness who testified that he thought that a friend of his was using his name. Now the only person who was asked any question like that was that Mr. Landow who came in to testify -- and, as I said, it is your recollection of the evidence that controls, but I am going to suggest to you what you heard about that evidence yesterday was just not correct.

I am going to read to you from the transcript that was prepared as to what Mr. Landow said -- and I am reading from pages 210 and 211 of the transcript. On the cross-examination of Mr. Landow he said that he had never bought or sold any Franklin Properties stock and did

kp12

not have an account at Maher or anything.

He was asked by Mr. Rosenberg's attorney:

"Mr. Landow, do you know whether somebody either did buy or sell Franklin Properties stock using your name?

"A I don't know for sure.

"Q Do you have any readon to believe that somebody did?

"A I have reason to believe that somebody might have used my name, otherwise I wouldn't be here" --

Now that is pretty logical on his part.

"Q It was somebody who knew you?

"A I don't believe so, but I don't know for sure."

That is not quite the same --

MR. AIDALA: May I ask that he continue reading, your Honor?

THE COURT: No, he can do what he wants.

MR. LOWE: He ends with him saying that he does not know Mr. Rosenberg.

Now, there was some discussion about the possibility that a section of the tape contains the word "Federal," and what was being referred to by Mr.Rodman was his Federal case.

Now, ladies and gentlemen, a couple of comments

about that. There is nothing in the context of that conversation to suggest that. I am not even sure that the word "Federal" is there, but if it is, think about this: What was the only "Federal" that you have heard about in this case? The only "Federal" about which there is evidence in this case is one of the nominee accounts, Federal Acceptance Company -- that is the only Federal about which there is any evidence.

There was also some commentary on the fact that Mr. Rosenberg was arrested and Mr. Rodman was not. As anyone well knows, being arrested does not mean anything at all. It is certainly no evidence of anything, of guilt or anything else.

You might recall something that Mr. Doonan said when he was on the stand. When he went to arrest Mr. Rosenberg he said that Mr. Rosenberg asked him to please be compassionate and let him drive his wife to the station and what not -- not arrest him and take him away in front of his wife, and Mr. Doonan said, "I thought about it and I decided that that is what I would do" -- and he decided that he would be compassionate.

Now what else do you know about him? You know from what you heard that Mr. Rodman was due to go on trial very shortly in another case, unrelated to this case, and

you know that Mr. Rodman was not arrested, and you also know from Mr. Doonan's testimony that the people involved in this case representing the government are not beyond being compassionate, and when you think of Mr. Rodman was not arrested, think about that.

And argument has been made to you that there was no proof that these gentlemen intended to use the mails. Once again, ladies and gentlemen, we don't have any proof that they sat down and said to each other, "Let's use the mails," but what do we know? We know from the evidence that the routine practice of the industry was to use the mails everytime there was a transaction; that when John Maher would sell stock to Kenny Noonan's firm they would mail them a notice of that fact; that when Kenny Noonan would sell stock they would mail notice of that fact to the customers, and it was almost inevitable that that happened, because that was the custom and practice of the business, and we also know that both Mr. Rodman and Mr. Rosenberg were experienced in the business and they knew that that was the custom and practice in that industry.

So, ladies and gentlemen, they did not have to sit down and say, "Let's use the mails." They knew if their scheme had gone through and that Noonan had actually persuaded his customers to buy stock and had gotten purchasers

for that stock for John Maher Associates, the mail would have been used.

Something else came up in the course of both defense summations, making reference to the tip of the iceberg and evidence that you haven't been told.

Ladies and gentlemen, you have seen the evidence that is available to you. You can decide whetherit is the tip of the iceberg or not. Telling you it is thetip of the iceberg is not a substitute for evidence that is the tip of the iceberg. Once again, ladies and gentlemen, it is the old thunder and lightning.

A lawyer in a case may say a lot of things, but what he says is no substitute for the evidence,and when you evaluate the arguments that you have heard in the course of this case, they may be well made, they may be well phrased, they may be accompanied by interesting little anecdotes andstories,but when you evaluate the arguments themselves, ask yourselves this question: what evidence is there? What evidence is there in this case to support that argument? What evidence is there which I can make a conclusion on and draw a reasonable inference -- to say yes, that argument makes sense, yes, it does make sense, and yes, it convinces me, that is what you have to have, because the volume or the skill with which the argument

may be made is not substitute for the evidence upon which it is ultimately based. And, ladies and gentlemen, if there is no evidence that you can find in this case to support a particular argument, mine or anyone else's, your common sense tells you whatyou must do.

The first part is an introduction followed by

You must reject that argument. To give you an example --

MR. AIDALA: I'll object, your Honor. This is not another summation. I think he is going beyond the purpose --

THE COURT: Overruled.

MR. LOWE: There was talk in the summations by the defense that Mr. Rodman was afraid of Mr. Noonan. That, ladies and gentlemen, is an argument, a conclusion. As a statement of fact, coming from an attorney in argument, it must be either based on the evidence or rejected by it.

Apart from an incident in 1973 involving a gun, what evidence is there? What evidence is there on the tape which despite all the thunder is still there? What evidence is there that Mr. Rodman was afraid of anything except perhaps of getting caught? He wishes this man -- he supposedly was afraid of -- good luck. He talks to him like a friend. He tells him not to worry about getting paid. He tells him to make sure he is going to get a full count. There is not even evidence that Noonan was on Rodman's back.

Do you remember what Noonan said? He was interested in having Rodman buy some buildings because Noonan thought he could make some money if he could get financing

to get these buildings bought and he could manage them. There is no evidence to the contrary.

Finally, one other comment was made. Mr. Rosenberg's lawyer made a comment to you, and if I am not quoting him exactly I am being true to the substance: He said that just because the prosecutor calls a witness to the stand doesn't mean that the prosecutor believes him. Ladies and gentlemen, I am not going to answer that argument. I am going to read to you something from the American Bar Association Standards letter relating to the prosecution function.

MR. BERGER: Objection, your Honor.

THE COURT: Under the circumstances I believe it is fair comment. I will permit it.

MR. AIDALA: May I be permitted to read from the Code of Professional Responsibility?

THE COURT: No, no. You had an opportunity to sum up to this jury. I will have no further argument.

I believe this is fair comment in response.

MR. AIDALA: I respectfully except.

MR. BERGER: I respectfully except.

THE COURT: Yes.

MR. LOWE: Standards, part 5.8(b): That it is unprofessional conduct for the prosecutor to express his

personal belief or opinion as to truth or falsity of any testimony or evidence or the guilt of the defendant.

The reason for that, ladies and gentlemen, is that my personal opinion is not worth anything. No lawyer's personal opinion in a case about the case is worth anything.

The government asks you to do just one thing in this case, and that is to be true to the oath you took when you were sworn as jurors, to well and truly try this case according to the evidence and the law -- according to the evidence and the law. That, ladies and gentlemen, is what counts. This case is not against Mr. Noonan. This case is not against Mr. Robert Sunshine. This case is not against the government or any of its representatives. This is the case in which you are asked to consider the evidence against Mr. Rodman and Mr. Rosenberg.

The government submits that the evidence shows what they did: The testimony, the documentary evidence, and, beyond everything else, those tapes which are still there -- they have not gone away; they remain despite everything.

And you know this, that Mr. Rodman didn't have a gun put to him when he was in his own home on the telephone talking to Mr. Noonan; and you know this too, that Mr. Rosenberg didn't have a gun put to him when he was in his

own office talking to Mr. Noonan on the telephone. Mr. Rosenberg didn't even know Mr. Noonan, and certainly you can't be afraid of somebody you don't know.

Having considered the evidence, and just the evidence, ladies and gentlemen -- that's all there is, really, for you to consider -- and having listened to his Honor's explanation of the law which will come momentarily, I suggest to you the following:

Your responsibility as jurors, as representatives of the people of the United States, of the people of the Southern District of New York, will be clear to you because when the evidence establishes beyond a reasonable doubt that the defendants did what it is charged they did, it is your responsibility, your responsibility as jurors, to return a verdict of guilty.

I thank you for your attention.

THE COURT: I had some pretrials scheduled for 9:30. This case has gone over a little beyond that. I am about to charge the jury. That charge will take approximately 45 minutes, so anybody who is on the pretrial can come back in 45 minutes or so.

(Pause.)

- CHARGE OF THE COURT -

GAGLIARDI, J.: Members of the jury, the purpose of that instruction is obvious to you, that you are not to be distracted by the coming in and going out of people who would divert your attention from what I am to talk to you about, which is the law in this case.

You are now about to enter upon your final duty, which is to decide the fact issues in the case. As I told you in my instructions at the beginning of the trial, your principal function, or one of your principal functions, would be to listen to the witnesses, observe them carefully, and it has been evident to me that you have done just that.

We have now reached the point in the case where all the evidence has been presented and the closing arguments of the lawyers have been made. Shortly after I have completed my instructions to you on the law, you will retire to deliberate upon your verdict, and you are to perform this final duty in an attitude of complete fairness and impartiality. You are to appraise the evidence calmly and deliberately and, as was emphasized by me at the time of your selection as jurors, without bias or prejudice with respect to either the government or the defendants as parties to this controversy.

The fact that this prosecution is brought in the

name of the United States of America entitles it to no greater consideration than accorded to any other party. By the same token, it is entitled to no less consideration. All parties stand as equals before the bar of justice.

Your final role, as I said, is to pass upon and decide the fact issues in the case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony, and you draw whatever reasonable inferences that are to be drawn from the facts as you have determined the facts to be.

2-2 My function at this point is to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine the facts to be. The logical result of that application would be your verdict in this case.

With respect to any fact matter, it is your recollection, and yours alone, that governs. Anything that counsel for the government or for the defense may have said with respect to any matters in evidence, that is as to any factual matter, whether stated in a question, in argument, or in summation, is not to be substituted for your own independent recollection; and, so too, anything that the

court may have said during the progress of the trial with respect to a fact matter, or may say during the course of these instructions, is not to be taken in substitution of your own independent recollection, which governs at all times.

Before we consider the precise charges contained in the indictment, a number of preliminary observations are in order.

In determining the facts you are not to be influenced by rulings that the court may have made during the trial. These rulings dealt with matters of law and not questions of fact. Counsel for both sides had the duty to present whatever legal objections they believed existed as to the admission of offered evidence. The court's rulings on objections made either by the attorney for the government or the attorneys for the defendants are not to be considered by you.

I want to re-emphasize, at this particular point, in view of some of the questioning we had yesterday with regard to Mr. Sunshine, this: I told you at the outset, where I have sustained an objection to a question you must not speculate on what the witness would have said had he been permitted to answer, nor may you draw any inference from the wording of the question or the fact that it has

been asked. I refer not only to that in connection with Mr. Sunshine yesterday, but with respect to every witness who was called in this case.

You must remember, however, that in ruling on objections the court was deciding questions of law and not questions of fact which are for you, and you alone.

It is always possible that a judge can have a great deal of influence upon a jury. If you think that you have gleaned some indication as to my opinion of the case, either from any questions that I may have asked or from my expression or tone of voice, disregard it entirely. The court has no opinion as to the guilt or innocence of these defendants or as to the veracity and credibility of the witnesses or the merits of the case. You are the judges of the facts and you are the sole judges of the guilt or innocence of these defendants. I am merely a judge of the law.

Please do not in any way be influenced in how you are going to decide this case by any act or conduct on my part that has given an indication as to how I think you should decide it.

The fact issues must be decided by you solely and only within the framework of the evidence and the principals of law that apply. Finally, don't single out

any one instruction of mine as stating the law alone. Take them all into consideration after you have heard them.

You are to consider only the evidence in this case, and that evidence consists of the sworn testimony of the witnesses, the exhibits which have been received in evidence, the facts which have been stipulated, and the presumptions, which I will tell you about in these instructions, such as the presumption of innocence.

But while you are to consider only the evidence in this case, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved such reasonable inferences as seem justified to you in the light of your own experience.

An inference is merely another word for a conclusion which reason or common sense leaves you to draw from the facts that have been proven here.

In considering the evidence you must remember, as I told you at the outset, that an indictment is only a formal method of accusing a defendant of a crime charged and, in itself, it is not evidence against the defendant, nor is any weight to be given to the fact that an indictment has been returned.

Generally speaking, there are two types of

evidence from which a jury may properly infer the truth as to the facts of the case. One is direct evidence; that is the testimony of an eyewitness, somebody who actually saw or heard something done or said.

The other is indirect or circumstantial evidence, which is the proof of a chain of circumstances pointing to the existence, or non-existence, of certain facts.

Generally, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with all the evidence in the case, both direct and circumstantial.

We have a rather common example which I think is helpful to you in distinguishing between direct and circumstantial evidence. I have used it in practically every one of my cases. There are other examples that can be used, but I think this one is most helpful when you have heard it for the first time.

Consider that today when you came in here we had a bright sunshiny day. There were no clouds in the sky, and it looked like a beautiful spring day. You could observe that. You could see that conditions were such as I have just described. Let's consider that we were in a courtroom right off the front entrance to this building, and the courtroom down there doesn't have any windows, and

we can't see outside.

Let's assume, after we have been court for an hour or an hour and a half, a spectator came in and all of you turned around and observed the spectator: His clothes appeared to be damp and his hair appeared to be damp. Assume a few minutes later another spectator came in and he had his hat in his hand and water was dripping off it, and his clothes were quite damp, and his face was a little damp. A couple of minutes later another spectator comes in and has an umbrella in his hand and a raincoat on and both the umbrella and raincoat are dripping water.

2-3 You could determine from those facts while it was nice and beautiful when you came in in the morning and there was no indication of rain, that these circumstances that I have just pointed out to you would indicate to you that in fact it was raining outside. That is circumstantial evidence: The chain of circumstances leading to the conclusion of the existence or non-existence of a fact.

As I have indicated to you, the law makes no distinction between direct and circumstantial evidence. It merely requires that you find the facts in accordance with all the evidence in the case, both direct and circumstantial.

I have mentioned "presumption of innocence."

The defendants here have entered a plea of not guilty and, thus, the burden is upon the government to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The law presumes a defendant to be innocent of a crime and, thus, a defendant, although accused, begins the trial with no evidence against him, and the law permits nothing but legal evidence presented before you as jurors to be considered in support of any charge against the defendant.

The presumption of innocence remains with the defendant throughout the trial in your deliberations until such time, if ever, that you are unanimously satisfied of guilt beyond a reasonable doubt. Thus, the presumption of innocence alone is sufficient to acquit a defendant unless and until, after careful and impartial consideration of all the evidence in the case, you, as jurors, are unanimously convinced of the defendant's guilt beyond a reasonable doubt.

Before I get to the specific charges in the indictment, I want to remind you of the witnesses in the order in which they appeared.

Again, as I told you before, if your recollection differs from what the court says with respect to the evidence

or the facts, it is your recollection that counts.

I hope this witness list is complete. If it is not, it is your recollection that governs. I will try to give you the list as I have recall it and written it down.

The first witness was Lewis Scala; he was a registered representative at John Maher Associates. The next witness was Kenneth Noonan. He was followed on the stand by Roy L. Patterson, from Colorado. He was followed by Timothy Jossen from Long Island; he was followed by Mrs. Jossen, Rose Jossen, also from Long Island. Then there was Andrew J. Calvin from Denver, Colorado; Lloyd J. Landow from Commack, New York; Victor Quadri, a clerk at the Chemical Bank; Sidney Protas from Bloomfield, New Jersey; Arthur Fine, a registered representative at John Maher Associates; Leon Nash; Joel Marcus, who was with Helfer, Broughtan and Company, a stock firm; the next witness was Rose La Fatina, who was employed in the United States Attorney's office in the division of mail records; the next witness was Charles Marcus, check casher; he was followed by Adam Ritter of Elmhurst, New York; Nicholas Shaheen of Boston; Thomas Doonan, who is with the Department of Justice, assigned to the United States Attorney's office for the Southern District of New York; Arthur Pendrick,

the president of John Maher Associates; and the last government witness was Robert Sunshine of Denver, Colorado.

Following that, certain documents were introduced in evidence by the government, and then the government rested.

The defendant Rodman called Elaine Winer, the secretary of Mr. Berger; his next witness was Rosemary Rodman, the wife of the defendant Rodman.

Certain stipulations were read into the record; certain documents were introduced.

Following that, all parties rested.

As I said, I believe that's my recollection, but it is your recollection that governs.

The indictment in this case, which I am about to read to you, contains one count which charges that the defendants conspired to violate the securities law and mail fraud statute.

A conspiracy count is divided into two sections. It is only one count, but there are two sections to it, and I am going to read the first part of it to you which describes the nature and purpose of the conspiracy, and following that I will read the second part of it which are the so-called "overt acts" to which reference would be made by you in connection with the reading of the first count.

The grand jury charges --

The first part is an introduction followed by subparagraph 1:

At all times material to this Indictment, William Rosenberg, the defendant, was a trader engaged in buying and selling securities at John R. Maher Associates, Inc., a broker-dealer registered with the United States Securities and Exchange Commission with offices at 101 Park Avenue, New York, New York. John R. Maher Associates, Inc. was owned by the defendant Rosenberg's wife.

2. At all times material to this Indictment, William Rodman, the defendant, was a self-employed securities dealer residing at 1 Fawnhill Drive, Monsey, New York.

3. At all times material to this Indictment, Franklin Properties, Inc. was a Nevada land development corporation with principal executive offices located in Denver, Colorado. The common stock of Franklin Properties was publicly traded on the over-the-counter market.

4. At all times material to this Indictment, J. Kenneth Noonan was a registered representative engaged in selling securities to the public at Leyner, Dreskin and Co., a broker-dealer registered with the United States Securities and Exchange Commission with offices at 50 Broadway, New York, New York.

2-4

II. The Conspiracy

5. From on or about November 1, 1975 up to and including December 8, 1975, in the Southern District of New York and elsewhere, William Rodman and William Rosenberg, the defendants, and others to the Grand Jury unknown, unlawfully, willfully and knowingly, did combine, conspire, confederate and agree together and with each other to commit violations of the laws of the United States, to wit, violations of Title 15, United States Code, Sections 77q, 77x, 78j(b) and 78ff, and Title 18, United States Code, Section 1341.

Relevant portions of certain of those sections will be read to you shortly.

The object of the conspiracy.

6. The object of the conspiracy was (a) to gain control of the market of Franklin Properties common stock, (b) fraudulently to inflate the market price of Franklin Properties common stock through rigged trading, secret kickbacks and bribes to brokers and registered representatives and by other means, and (c) fraudulently to unload approximately 150,000 shares of Franklin Properties stock on the unsuspecting public.

The means by which the conspiracy was carried out:

7. Among the means by which the defendants and their co-conspirators would and did carry out the said conspiracy were the following:

(a) As of December 3, 1975, William Rosenberg, the defendant, acting through John R. Maher Associates, Inc., had accumulated approximately 150,000 shares of Franklin Properties common stock.

(b) On or about December 3 and 4, 1975, William Rodman, the defendant, offered J. Kenneth Noonan a bribe in order to induce Noonan to sell Franklin Properties common stock to his customers, while fraudulently failing to disclose to his customers that Noonan would receive the bribe from the defendants in addition to the ordinary broker's commission on the sale. The bribe was to be 50 cents per share for every share Noonan sold to his customers. Rodman referred Noonan to William Rosenberg, the defendant, to make arrangements for selling the stock and collecting the bribe.

(c) On or about December 5, 1975, William Rosenberg, the defendant, outlined the deal to Noonan, instructed Noonan that all sales were to be directed to John R. Maher Associates, Inc. and assured Noonan that the bribe offered by the defendant Rodman would be paid and that said bribe would not be disclosed.

That's the first half of the conspiracy count. As I indicated, I will read the other part of it later.

Before you may find these defendants guilty of conspiracy as charged in the indictment, you must find the following three elements beyond a reasonable doubt. I will define for you what the words "reasonable doubt" mean.

The three elements are the following:

First, that some time approximately between November 1st, 1975 and December 8, 1975, the dates specified in the indictment, an agreement or understanding existed between these two defendants to commit the crimes specified in the indictment, namely, the fraudulent sale of shares of Franklin Properties stock and mail fraud. In short, the government must prove that a conspiracy existed with respect to the fraudulent sale of Franklin Properties stock and mail fraud. That's the first element.

The second element is that these defendants, Rodman and Rosenberg, knowingly and willfully became participants in the conspiracy with knowledge of its criminal purposes.

The third element is that one of the conspirators knowingly committed at least one overt act set forth in the indictment at or about the time alleged in furtherance of the conspiracy, and that at least one of these acts was committed

in the Southern District of New York, which, for our purposes, includes Manhattan, the Bronx, Westchester, Rockland County and other counties.

I will now define a conspiracy for you, which is the first element. The conspiracy charge is rather lengthy. I will try to speak as slowly as I can, but still there should remain some continuity for you to follow. If I go too fast, please raise your hand and let me know and I will slow down.

First, as to the existence of a conspiracy. Simply defined, a conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose. In this case it is claimed that only the two defendants were involved.

A conspiracy is an unlawful combination or agreement to violate the law. Whether or not the persons charged in the indictment accomplished what is alleged they conspired to do is immaterial to the question of guilt or innocence. Thus, the success or lack of success of the conspiracy does not matter, for a conspiracy is a crime entirely separate and distinct from the substantive count that may be the goal of the conspiracy.

A conspiracy has sometimes been called a partnership in criminal purposes in which each member becomes the

agent of every other member.

However, to establish the existence of a conspiracy, the government is not required to show that the two defendants sat around a table, entered into a solemn compact, orally or in writing stating that they have formed a conspiracy to violate the law, setting forth the details of the plan, the means by which it is to be carried out, or the part to be played by each of them. Your common sense will tell you when men undertake to enter into a conspiracy much is left to unexpressed understanding.

2-5

Conspirators do not usually reduce their agreements to writing or acknowledge them before a notary public, nor do they publicly broadcast their plans. A conspiracy is almost always characterized by secrecy.

In determining the existence of a conspiracy it is sufficient if you find beyond a reasonable doubt that these two defendants in any manner, through any contrivance, impliedly or tacitedly, came to a common understanding to violate the law.

In determining whether there has been an unlawful agreement you may consider acts and conduct which are done to carry out a criminal purpose. Usually the only evidence available is that of disconnected acts on the part of the alleged individual conspirators which acts you may find when

taken together in connection with each other and with the reasonable inferences flowing therefrom show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof.

If upon consideration of all the evidence, both direct and circumstantial, you find beyond a reasonable doubt that the minds of these two defendants met in an understanding way and that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful scheme alleged in the indictment, and that therefore, at least, one of the defendants did any overt act to effect the object of the conspiracy, then proof of the existence of the conspiracy is established.

In this connection I previously told you that it is not necessary for the government to prove the success of the conspiracy in order to establish a violation of the statute.

As a conspiracy is basically an agreement to violate the law, it may exist even though the final objectives were never accomplished.

With respect to the existence of a conspiracy, some further comments may be helpful:

You will recall that I defined a conspiracy as a combination of two or more persons who, by concerted

action, attempt to accomplish some unlawful purpose. Thus, before you may find that a conspiracy existed you must also find that what the conspirators intended to do would have violated one or more federal laws if they had succeeded in accomplishing what they set out to do.

With respect to the existence of the conspiracy, the indictment alleges that the conspiracy commenced on or about November 1, 1975 and continued up to December 8, 1975. It is not necessary for the government to prove that the conspiracy started and ended on those specific dates. It is sufficient if you find that, in fact, a conspiracy was formed and that it existed for some substantial time within the period set forth in the indictment, and that at least one overt act was committed during that period. A conspiracy once formed continues for as long as the evidence shows the conspirators intended to continue it. Such intention may be inferred from such activities by any of the conspirators which you may find to be in furtherance of the purpose of the conspiracy.

The second element, participation in a conspiracy:

In determining whether the defendants became members of the conspiracy, you must determine not only whether he participated in it but whether he did so with knowledge of its unlawful purpose. Did he join with an awareness of at least some of the aims and purposes of the conspiracy?

Knowledge is a matter of inference from facts proved. It is not necessary that each defendant be fully informed as to the details of the scope of the conspiracy in order to justify an inference of knowledge.

A defendant need not know the full extent of the conspiracy and all of its activities. However, mere association with one another does not make one a member of the conspiracy. Nor is knowledge of the conspiracy without participation sufficient. What is necessary is that a defendant participate with knowledge of at least some of the purposes of the conspiracy and with the intent to aid in the accomplishment of those unlawful ends.

Now, the indictment charges a conspiracy between these two defendants. A person cannot conspire with himself, and therefore you cannot find either of the defendants guilty unless you find beyond a reasonable doubt that he participated in a conspiracy as charged with the other defendant.

I instruct you that James Kenneth Noonan was not a conspirator and that any agreement between Noonan and either of the defendants, if any, does not constitute a conspiracy as charged in the indictment, but maybe considered by you only for the purpose of your determining whetherthe defendants Rodman and Rosenberg participated in a conspiracy with each other as charged in the indictment.

In determining whether a particular defendant conspired with the other, you may consider only his own acts and statements. He cannot be bound by the acts or statements of the other alleged participant until you are satisfied beyond a reasonable doubt that a conspiracy existed and that the defendant you are then considering was one of its members. In other words, your determinatic.. as to the participation in the conspiracy of each defendant must be based upon what you find to have been his own actions; his conduct; his own statements or declarations; his connection with the acts and conduct of the other alleged co-conspirator and the reasonable inferences to be drawn therefrom.

If you find beyond a reasonable doubt that a conspiracy existed, then the statements thereafter knowingly made and the acts thereafter knowingly done by one defendant

mkp3

can be considered by the jury as evidence in the case as to the other defendant, even though the statements and acts may have occurred in the absence and without the knowledge of that defendant, provided such statements and acts were knowingly made and done during the continuance of the conspiracy and in furtherance of some object or purpose of the conspiracy.

Thus, statements of any conspirator which are not in furtherance of the conspiracy or which are made before its existence or after its termination may be considered only as evidence against the person making it.

If you find that the conspiracy existed, the extent of a particular defendant's participation in it has no bearing on the question of guilt or innocence. The guilt or innocence of a conspirator is not measured by the extent or the duration of his participation. Even if he participated in it to a degree more limited than that of his co-conspirator, he is equally culpable so long as he was in fact a conspirator. If one conspirator had a less significant role in the conspiracy than the other, he is equally culpable so long as you find beyond a reasonable doubt that there was a conspiracy. Thus, each member of the conspiracy may perform separate and distinct acts at different times and at different places. One may play

a major role while the other plays a minor role.

In other words, a defendant may be held responsible for all that has been done in furtherance of the conspiracy, even though he was unaware of some of the specific acts carried out by his co-conspirator. And using the partnership analogy, by becoming a partner a conspirator assumes all the liabilities of the partnership, including those incurred on the partnerships behalf by another partner.

It is not necessary that a defendant receive any pecuniary benefit from his participation in the conspiracy as long as he, in fact, participated in it in the way I have instructed you.

The question is: did the defendant join the other with the awareness of at least some of the basic purposes and aims of the conspiracy? If so, then he adopts as his own the acts of the other conspirator.

Now in determining the existence of the conspiracy or as to whether either of these defendants was a member of the conspiracy, you may consider only his own statements. You may remember that I told you that we took certain testimony subject to connection, and that is that that evidence was received on a conditional basis. Unless and until you find that a conspiracy existed, statements

kp5

made by one who is alleged to be a conspirator outside the presence of the other is not binding on the other unless and until you find that each was a member of the conspiracy.

So much for the first part of the conspiracy charge.

Now with respect to the second part of it, which is the overt acts.

If you find beyond a doubt that the alleged conspiracy existed, you must then consider the third element, and that is the requirement of an overt act. The overt acts referred to in count 1 are not separate charges and are part of the conspiracy count. You may not find the defendants guilty unless and until you are convinced beyond a reasonable doubt that one of the overt acts charged in the indictment was knowingly and wilfully committed by at least one of the conspirators, and that it was committed in the Southern District of New York -- and I have defined the counties which for our purposes are part of the Southern District of New York.

The offense of conspiracy is complete when the unlawful agreement is made and any overt act is done by the conspirator -- in the language of the statute -- to "effect the object of the conspiracy."

Thus, an overt act is an act knowingly and wilfully committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be a criminal act or an act which, of itself, constitutes an objective of the conspiracy. It may be an act which is innocent on its face, but it must be of such character that it furthers, promotes, or aids and assists in accomplishing a purpose of the conspiracy charged in the indictment.

It is not necessary for you to find that both alleged overt acts charged were committed, nor is it necessary that an overt act involve a particular defendant.

It is enough if you find that at least one of the named overt acts charged in the indictment was committed by a conspirator in furtherance of the conspiracy.

The indictment, insofar as the overt acts, reads as follows:

"In furtherance of said conspiracy and to effect the objects thereof, the defendants committed the following overt acts in the Southern District of New York:

"1. On or about December 4, 1975, the defendant, William Rodman, had a telephone conversation with J.Kenneth Noonan during which Rodman assured Noonan

that the bribe would be paid by the defendant, William Rosenberg.

"2. On or about December 5, 1975, the defendant, William Rosenberg, had a telephone conversation with J. Kenneth Noonan during which Rosenberg outlined the terms of the deal to Noonan and assured Noonan that the bribe would be paid."

Now in defining the elements of the conspiracy -- let me suggest to you that that concludes the question of the part of the conspiracy and the overt acts. Normally overt acts in the indictment are set forth at the conclusion of the conspiracy count. I had neglected to charge you certain other portions of the conspiracy count, other than the overt acts. Remember, I stopped after we had the means by which a conspiracy was to be carried out. There are other parts of it which I will read to you at this point.

"It was part of said conspiracy that the defendants unlawfully, wilfully and knowingly, in the offer and sale of securities of Franklin Properties, Inc. by the use of means and instruments of transportation and communication in interstate and foreign commerce and by the use of the mails would, directly and indirectly, employ devices, schemes and artifices to defraud, (b) obtain money and property by means

of untrue statements of material facts and omissions to state facts necessary to be stated in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and (c) engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon purchasers of the securities of Franklin Properties, Inc. in violation of Title 15, United States Code, Section 77(q) and 77(x).

"12. It was further a part of said conspiracy that the defendants unlawfully, wilfully and knowingly would devise a scheme and artifice to defraud and for obtaining money or property by means of false and fraudulent pretenses, representations and promises and for the purpose of executing such scheme and artifice and attempting to do so would knowingly cause mail matter to be delivered according to the direction thereon in violation of Title 18, United States Code, Section 1341.

"13. It was further a part of said conspiracy that thedefendants unlawfully, wilfully and knowingly, directly and indirectly, by the use of means and instrumentalities of interstate commerce and of the mails, would use and employ a manipulative and

kp9

deceptive device and contrivance in contravention of Rule 10(b)(5) (17C.F.R. 240.10b-5), a rule prescribed by the Securities and Exchange Commission as necessary for the protection of investors."

That should have been read to you before with the overt acts.

Does anybody have confusion as to that? That is part of the original conspiracy.

In defining the elements of a conspiracy, I have used the words "knowingly" and "wilfully."

A person acts "knowingly" if he acts voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake or accident or other innocent reason.

A person acts "wilfully" if he acts voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the laws.

In summary, a conspiracy consists of three essential elements:

First, that a conspiracy existed as charged in the indictment.

Second, that the particular defendant knowingly and wilfully entered into the conspiracy; and, third, that one of the conspirators knowingly and wilfully committed at least one of the overt acts set forth in the indictment. You must be satisfied that the government has established each of these elements beyond a reasonable doubt.

Now the latter part of this indictment which I have just read to you contains the statutory allegations, and before you may find the defendants guilty, you must find not only that each was a member of the conspiracy, but also that the purpose of the conspiracy or the object of it was to violate these statutes.

Section 77q of Title 15 states as follows -- you don't have to remember the section number at all, but just what it provides.

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --

"(1) to employ any device, scheme or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission

kp11

to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Section 78j(b) of Title 18 states:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Section 1341 of Title 18, the mail fraud statute, states in pertinent part as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for

obtaining money or property by means of false or fraudulent pretenses, representations or promises, for the purpose of executing such scheme or artifice or attempting so to do, places in any Post Office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or knowingly causes to be delivered by mail according to the direction thereon" is guilty of a crime.

Both the Securities and the Mail Fraud statutes refer to a scheme, artifice and so forth. For purposes of our discussion I will describe what a scheme and artifice, and so forth, are. It applies to both.

Now with respect to the Securities fraud elements, the following must be established by the government beyond a reasonable doubt that the defendants wilfully and knowingly conspired to do the following:

1. That the defendants intended in connection with the sale or offer for sale of Franklin Properties stock, to engage in a scheme to defraud or to obtain money and property by means of untrue statements of material facts, or by means of omissions to state material facts necessary in order to make the statements not misleading.

2. That the defendants intended to do so wilfully and knowingly.

3. That the defendants agreed and intended to use or cause to be used the mails or means of communication of interstate commerce in furtherance of the scheme.

The first element, "scheme or artifice to defraud"; the words "scheme" and "artifice" as used in the statute include any plan or course of action intended to defraud others, and to obtain, by false or fraudulent pretenses, representations, or promises, money or property from persons so defrauded.

A statement or representation is "false or fraudulent" within the meaning of this statute, if known to be untrue, or made with reckless indifference as to its truth or falsity, and made or caused to be made with the intent to defraud.

A "false or fraudulent representation may be made by statements of half-truths or the concealment of material facts as well as by affirmative statements or acts.

Though proof that someone was actually defrauded is unnecessary to show securities fraud, the government does have the burden of showing that some actual harm or

injury was contemplated by the schemer. The purpose of the scheme "must be to injure."

The proof must establish that the defendants intened to make a misrepresentation of material fact or to omit to state a material fact and that said material representation and/or material omission was intended to exist at the time the statement was made.

To establish that the defendants are guilty of the crime of conspiracy to commit the mail fraud, the government must prove by a reasonable doubt that the defendants wilfully and knowingly conspired to do the following:

1. That the defendants devised or intended to devise a scheme or artifice to defraud or to obtain money by fraudulent pretenses and representations.

2. That the defendants intended to devise or become a party to such a scheme or artifice knowingly and wilfully with knowledge of its fraudulent nature and with intent to defraud.

3. That, for the purpose of executing the scheme or artifice the defendants agreed and intended to use or cause another to use the mails.

Now with respect to the third element of the offense of mail fraud is th use of the mails. Now there

kp15

is no proof in this case that the mails were actually used. If you should find that the nature of the planned criminal activity, that is, the sale of Franklin Properties stock to Noonan's customers under false pretenses, required the use of the mails -- if you should find that the nature of the activity, that is, the sale of fraudulent Franklin Properties stock to Noonan's customers under false pretenses required the use of the mails and that the defendants, by reason of their experience, knew this because if sales had been made to Noonan's customers, confirmations of those sales would have been mailed to the customers according to the regular practice of the industry and the sales to Noonan's firm by John R. Maher Associates, Inc. would have been confirmed by mail to Noonan's firm by John R. Maher Associates, according to the regular practice in the industry.

If you find beyond a reasonable doubt that the nature of the alleged criminal plan agreed to by the defendants, and that there was such a plan -- and I am not saying that there is, but if you should find that there was, would cause the mails to be used in the ordinary course of business, and that the defendants knew this, this would be sufficient under the mail fraud provisions.

Now I have used the word "materially" with

respect to the charges here. The Securities and Mail Fraud statutes all involve the concept of "materiality." The Securities Fraud Statute employs the term "material" when speaking of misrepresentation of a material fact or the omission to state a material fact.

The falsity involved in mail fraud must likewise be "material."

A fact is material if it is one which would induce the person to whom it is communicated to act because of it, that is, if it affects its conduct. For example, with respect to securities fraud, a fact is material if it would induce an investor to purchase or to refrain from purchasing a security.

In this case the government contends, and the defendants deny, that the defendants intended not to disclose to the customers to whom Kenneth Noonan recommended the stock of Franklin Properties that Noonan would be paid a bribe of 50 cents a share, in addition to any ordinary commission.

I charge you that if you find that the failure to disclose that fact would have affected a purchaser's decision to purchase or refrain from purchasing Franklin Properties stock, it is a material omission.

Now with respect to the words "wilfully",

"knowledge" and "intent," a person acts, as I said before, wilfully if he acts voluntarily and intentionally with a specific intent to do something that the law forbids.

An act or failure to act is "knowingly" done if done intentionally and not because of mistake or other innocent reason.

Knowledge and intent exist in the mind. We all realize that it is not possible to open up a person's head to find out what is going on in his mind, and the only way that you may have for arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence and determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is not only unnecessary but it is impossible.

Knowledge and intent may be inferred from all the surrounding circumstances.

Now, I told you before that each element required proof beyond a reasonable doubt. I am getting to the point where I am going to define reasonable doubt for you.

The words almost define themselves -- that there is a doubt founded in reason and arising out of the evidence or lack of evidence. It is a doubt which a reasonable person has after carefully considering all the

kp18

evidence. A reasonable doubt is not a vague or speculativ or imaginary doubt. It is not caprice, whim or speculation It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

A reasonable doubt is a doubt which appeals to your reason, your common sense, your experience and your judgment. It is a doubt which would cause a reasonable man or woman, like yourselves, to hesitate to act in relation to your own importantprivate affairs.

Mere suspicion will not justify a conviction. Suspicion is not a substitute for evidence, nor is it sufficient to convict if you find that the circumstances merely render an accused probably guilty.

On the other hand, it is not required that the government must prove guilt beyond all possible doubt, but the proof must be of such convincing character that you would be willing to rely and act on it in the important affairs of your own life.

In sum, a reasonable doubt exists whenever, after fair and impartial consideration of all the evidence before you, you can honestly and candidly state that you do not have an abiding conviction that the defendants are guilty of the charge.

Now with respect to the credibility of witnesses --

kp19

and before I get into a discussion of it, in summation counsel for Mr. Rosenberg says that just because a prosecutor calls a witness does not mean that he believes him.

I am going to tell you that the opinions of counsel, one side or the other, as to the merits of this case or anything else, are not a concern of yours, as I told you before. Counsel's statement with respect to this should have no bearing upon your determination of the credibility of a witness, which should be determined upon the following general principles. You are the sole judges of the credibility of the witnesses, and you and you alone must determine what weight their testimony deserves. I gave you some guidelines at the start of the case, and I would like to expand on this point.

You should not be influenced by the number of witnesses called by either side. The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side; rather, you should consider all the facts and circumstances in evidence to determine where the truth lies.

In assessing credibility, you should carefully scrutinize the testimony given, the circumstances under which the witness has testified, and every matter in

evidence which tends to indicate whether the witness is worthy of belief.

The degree of credit to be given to a witness should be determined by his demeanor, his relationship to the controversy and the parties, his bias or impartiality, the reasonableness of his statements, the strength or weakness of his recollection viewed in the light of all the other testimony, and the attendant circumstances in the case, and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

How did the witness impress you?

Did his version appear straightforward and candid, or did he try to hide some facts?

Is there a motive to testify falsely?

In passing upon the credibility of a witness, you take into account inconsistencies or contradictions as to material matters in his own testimony or any conflict with that of another witness, also any inconsistencies oromissions in prior testimony or any prior statement of material matters as to which he may have testified upon the trial.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause a jury to discredit such testimony.

Two or more persons witnessing an incident or a transaction may see or hear it differently, and innocent misrecollection, like failure of recollection is not an uncommon experience.

A witness may be inaccurate, contradictory or untruthful in some respects and yet be entirely credible in the essentials of his testimony.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood.

If you find that any witness has testified falsely you can do one of two things: you can either reject all of that witness's testimony on the ground that it is all tainted by falsehood and that none of it is worthy of belief, or you can accept that part which you believe to be true and reject that part which you believe to be tainted by falsehood.

Now, should you find that all or any part of a particular witness's testimony was false, you may not, of course, infer that the opposite of that testimony is the truth, unless there is other evidence to that effect in the record.

Any testimony rejected by you as false is no

longer in the case insofar as any finding that you may make is concerned.

An inference, as I am sure you will recall I told you, was a conclusion which your reason or common sense leads you to draw from the facts which you find have been proved. Thus, a finding of fact may not be established merely by a negative inference arising from your disbelief and rejection of any testimony.

The ultimate question in passing upon credibility is, did the witness tell the truth here before you? It is for you to say whether his testimony at this trial was truthful in whole or in part, in the light of his demeanor, his explanations and all the evidence in the case.

Now I charge you that the witness Kenneth Noonan was an informant. The services of an informer are availed by government agents to obtain leads to persons suspected of violating the law. Whether or not you approve of the use of an informant in an effort to detect law violation is not to enter into your deliberations.

The testimony of an informant who provides evidence against a defendant must be examined and weighed by the jury with caution and care -- greater caution and care than that of an ordinary witness.

The jury must determine whether the informant's

kp23

testimony has been affected by interest or prejudice against a defendant. The crucial question solely is whether the testimony of the witness as he appeared before you here is truthful.

The testimony of a witness may be discredited or impeached by showing that the witness was convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight to be given to any prior conviction as impeachment.

I told you at the outset of this case that the law does not require a defendant in a criminal case to testify or present any evidence on his behalf. I have also told you that a defendant is not required under our laws to prove his innocence. He is presumed to be innocent at all times, and throughout the entire trial, unless and until the government proves him guilty beyond a reasonable doubt.

For these reasons a defendant need not take the witness stand and testify in his own behalf. The fact that a defendant did not testify at this trial does not

kp24

create any presumption for or against him, and I charge you that this fact must not weigh in the slightest against or for him, nor shall this fact enter into your discussions or deliberations in any manner.

There has also been evidence in this case relating to statements made by the defendants outside of the courtroom. Evidence relating to statements outside of a court should be disregarded, unless you are convinced that the statement was knowingly made, and I have told you previously that a statement is knowingly made when done voluntarily and intentionally and not because of mistake or other innocent reason.

In your deliberations please do not discuss the question of possible punishment. That is a matter that rests on my conscience and my conscience alone, because the Judge and the Judge alone is the one who has the obligation of imposing sentence when and if guilt is determined.

If you discuss it among yourselves you are encroaching upon my function, and I ask you not to do it. Your function is to consider the facts and to determine the facts, and my function is to pass upon the law, and in the event of conviction to impose sentence.

If you find on all the evidence that the evidence respecting the defendants leaves a reasonable doubt as to

their guilt, you should not hesitate for a moment to return a verdict of acquittal.

On the other hand, if you find beyond a reasonable doubt that the law has been violated as charged, you should not hesitate because of sympathy or because of any other reason to render a verdict of guilty.

The verdict must represent the considered judgment of each member. In order to return a verdict it is necessary that the verdict be unanimous.

It is your duty as jurors to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment.

Each of you must decide the case for yourselves, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain

the truth from the evidence in the case.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the marshal, signed by your foreman or one or more members of the jury. A member of the jury should never attempt to communicate with the Court by any means other than a signed writing; and the Court will never communicate with any member of the jury on any subject touching the merits of this case other than in writing, or orally here in open court.

You will note from the oath about to be taken by the marshal that he, too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any pending matter, any subject touching the merits of the case.

Bear in mind also that you are never to reveal to anyone, not even the Court, how you stand numerically or otherwise on the question of the guilt or innocence of the defendants unless and until after you have reached a unanimous verdict.

Again I would say that there is nothing said in these instructions to suggest or convey in any manner any intimation as to what verdict you should find, but what the verdict shall be is the sole and exclusive duty and

responsibility of the jury.

In announcing your verdict, after you have reached one, it will be "We, the members of the jury, unanimously find the defendant," whoever it is.

As I have heretofore indicated to you, you must find both defendants guilty or not guilty.

Now counsel have the right to take exception to any principles of law that I may have charged to you, or to request any additional instructions in case I have omitted to charge anything to you.

One other matter that did come to my mind that I did not have in here. There has been reference to a prior trial. That is in no way to be considered by you as anything whatsoever. Disregard it completely from your minds. You are only to consider what happens on this trial.

I think it would be better if you retired to the juryroom, and I will have you back in here after taking up these questions of law.

(Whereupon the jury left the courtroom at 10.50 a.m.)

THE COURT: Before you start, I thought I had within my charge but I did not have it, a standard charge on subject to connection.

Is there any objection to the way it was charged?

MR. BERGER: I don't believe so.

THE COURT: Well, you do not have any.

MR. AIDALA: No.

THE COURT: Are there any exceptions, Mr. Berger?

MR. BERGER: Yes, your Honor -- just with regard to the inference to be drawn from the knowledge of the defendants of the custom and use of the mails in the securities industry.

THE COURT: Okay. Mr. Aidala?

MR. AIDALA: I join in that exception, your Honor, plus I think the last, that your Honor made to the jury -- I understand, I think your Honor's intention in indicating that they should disregard completely anything about a prior trial. The point I am making, however, Judge, is that they can and should consider any testimony given by a witness at a prior trial in determining the credibility of that witness.

THE COURT: I think that is implicit in what I said.

Did you get any different impression?

MR. LOWE: To disregard completely the fact of the prior trial.

THE COURT: Will you read back what I said, Mr.

Reporter.

(Record read.)

MR. AIDALA: Your Honor, I object to the part where you say don't consider it in any way whatsoever. I think that they can consider any testimony at that trial.

THE COURT: If you think they got that impression-- I said only what happened on this trial.

MR. AIDALA: I respectfully except to that, your Honor. I would ask that your Honor instruct them that they can consider any testimony in a prior proceeding or trial which is inconsistent with the testimony at this trial.

Secondly, your Honor, in your charge concerning an informant, your Honor I think indicated that the services of an informant are used in respect of persons who are suspected of violating the law. I think your Honor used the words "suspected of violating the law." I think in this case there is no question whatsoever that Ken Noonan was the initiating force in beginning this case.

THE COURT: You have an exception to that request, and it is noted on the record. I think I gave the standard charge.

MR. AIDALA: May I just give the reason? I think that creates the impression that there was prior suspicion by the government as to any violations of law by this defendant,

kp30

and that of course would be a very prejudicial inference to be drawn by the jury.

THE COURT: All right. Any requests to charge? Do you have any exception?

MR. LOWE: No exceptions, your Honor. I have one request, simply that the jury be reminded about the exhibits --

THE COURT: About the exhibits.

MR. LOWE: -- that they can have the exhibits and hear the tapes or have the testimony read.

MR.BERGER: I join in the exception made by co-counsel.

MR. AIDALA: In reference to the exhibits, your Honor, I believe we should not forget that there was one exhibit --

THE COURT: I am aware of the transcript.

MR. AIDALA: No, the exhibit that was stricken.

THE COURT: 12.

MR. LOWE: It was not stricken; it was never admitted.

THE COURT:The one yesterday --

MR. AIDALA: The one with the figure.

THE COURT: The one with the figure, we agreed on that.

kp31

MR. LOWE: Oh, yes, I am sorry.

MR. AIDALA: And there was one other exhibit that was only admitted, not for the contents, but I think just for the fact that it was sent -- the date. In other words, it was not admitted for the contents.

THE COURT: That was a letter from Mr. --

MR. LOWE: That was a letter from Mr. Sunshine to Mr. Rosenberg in which it was admitted for the purpose of showing it was sent, and then the testimony showed that thereafter Mr. Sunshine got an accounting or what purported to be an accounting, and never got any contradiction of his letter.

MR. AIDALA: The point is the jury should not be given that letter because it was not introduced for what its contents were.

THE COURT: Well, it was admitted in evidence.

MR. AIDALA: It was only accepted for one reason.

THE COURT: That is right, and it was told to them at the time why it was accepted.

Anything else?

MR. AIDALA: I object to them receiving that exhibit.

THE COURT: Well, they haven't asked for it yet.

Anything else?

(No response.)

THE COURT: All right, bring the jury back.

(Jury in box.)

THE COURT: Just a couple of matters.

At the onclusion of my remarks I referred to a prior trial. What I intended to say was the fact that there was a prior trial does not enter into your considera in any way. There was certain testimony read and certai reference to it on the examination of witnesses -- that is to be considered for whatever weight you want, but the fa that there was a prior trial is not to be taken into your consideration in any way whatsoever. You are entitled to have any exhibits that you want.

If you need the testimony reread or anything l that, just send a note throuqh the marshal and we will tr to accommodate you as quickly as we can with whatever information you desire.

It is 11 o'clock at this time. I think it is a great convenience for jurors at this time of day not to go out to lunch, but rather to have lunch sent in. The marshal at some convenient time will be sent in and give you menus for you to make a selection of what you want for lunch -- if you want to do it that way.

If you go to a restaurant you will have to go

kp34

(Whereupon the two alternate jurors were excused from the courtroom.)

THE COURT: Incidentally, when I said exhibits or testimony, you are also entitled to have the indictment with you.

Will you swear the marshal.

(Whereupon the deputy marshal was sworn.)

THE CLERK: Will the jury panel please follow the marshal.

(Whereupon the jury retired at 11.05 a.m.)

THE COURT: Will you get all the exhibits together. I think you ought to go over them and see what they are.

Are you all going to be nearby?

MR. BERGER: Yes, your Honor.

THE COURT: If any notes come from the jury, we will pass on them when they come in. If they ask for the exhibits, we will take care of them before we sent them in.

All right.

(Time noted: 11:30 a. m.)

THE COURT: I have received the following note: For deliberation we would need tapes and transcriptions of tapes with machine.

Is the machine wound up?

MR. LOWE: I hope so, your Honor.

THE COURT: All phone bills.

Are the tapes wound back?

MR. LOWE: Yes.

MR. BERGER: What are we going to do?

THE COURT: Just a moment. Let's get everything out. You will know what we are going to do before we do it. Come up here and help him.

All cancelled checks.

Rosenberg's bank account.

Indictment document.

You have got the phone bills? All phone bills, all cancelled checks, William Rosenberg's bank account, and the indictment.

You have the tapes and the recorder there too.

Do you want to give that to me, please?

MR. AIDALA: Is our objection to the transcript noted on the record?

THE COURT: I will tell them that.

Call the jury in.

(Jury in box.)

THE COURT: I have your note here which will be marked as a Court exhibit:

For deliberation we would need tapes and transcriptions of tapes with machine entered in evidence; all phone bills -- which we have compiled here; all cancelled checks; a copy of William Rosenberg's bank account, and the indictment document.

With respect to the tapes on the transcriptions, the transcripts were not entered into evidence. You are welcome to have the machine and the tapes with you. If you want the transcripts the way we did it here in court, you will have to come back in court and we will play the tape in here and you can have the transcript. If you just want the tapes, all you can have is what is in evidence. If you want to go in and listen to the tapes and play them yourselves, you are welcome to do that. If you want to come in here and have the transcripts available, let me know.

In the meantime, we will send in all that you request. If you want the transcripts made and the tapes played, come back here and we will play them for you.

We have an electronic expert there? There is an eject button here and you can put the tape in, and there is

a solid square mark in there, which is a stop. This starts it, and then you can replay it, and there is a fast forward.

Above all, don't press the red button.

I will leave it in this position.

There is an exhibit mark on there which, I suppose, if it interfers with your playing it, you can remove it.

Did you want the first tape put in? I will do that.

I have been told that it has been rewound to its starting point.

The other exhibits, Mr. Lowe, please hand them to the marshal.

(Pause.)

MR. LOWE: Shall we note on the record the designations: Government Exhibits 2A, 2, 2B, 2C, 2E, 8, 8A, 8B, 9, 9A, 9B, 11, 12, Defendant's Exhibit C, and a copy of the indictment.

(The jury left the courtroom to continue their deliberation.

XXX

(Court Exhibit 2 marked.)

(Time noted: 2:20 p. m.)

(In open court.)

THE COURT: I have received a note stating, "May it please the court, the jury has reached a verdict."

THE CLERK: Court's Exhibit 3.

XXX (Court's Exhibit 3 is marked.)

(Jury present.)

THE CLERK: Madam Forelady, has the jury agreed upon a verdict?

THE FORELADY: May it please the court, the jury has agreed on a verdict.

THE CLERK: How do you find for defendant William Rodman?

THE FORELADY: We find the defendant guilty.

THE CLERK: How do you find for the defendant Rosenberg?

THE FORELADY: We find the defendant guilty.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it now stands recorded. You say you find the defendant William Rodman guilty, you find the defendant William Rosenberg guilty, so say you all?

(All jurors indicate in the affirmative.)

THE COURT: Do you wish the jury polled?

MR. AIDALA: Yes, your Honor.

capable, conscientious and dedicated jurors our system would fail, and I think it is the greatest system of justice in the world. I think we have the greatest country in the world, and part of that is the system of justice we have where disputes are resolved in the juryroom by people like yourselves. You can see by looking around in the associations that you have had for the last few days that you all come from different walks of life, different businesses, different ideas, and the common mix of all of you coming in together and resolving a dispute in the fashion that you have, without bitterness and with discussion on the merits and accepting the law as it has been charged to you.

It has been my great pleasure to have been associated with you and I want to thank you from the bottom of my heart for the service you have performed in this case. I do hope we meet again.

You are discharged from further service. That is an extra bonus. I am told that usually your checks will be mailed to you in due course.

Thanks for all you have done and it has been nice to be with you.

(Jury excused.)

THE COURT: I think, gentlemen, it is about six weeks to get a presentence report and I will set sentence

for May 19 at 9:30.

You may reserve your motions until the date of sentencing. On the other hand, if you gentlemen believe you have complicated or involved questions of law I would expect by May 1st a written motion or memorandum of law and would expect the government to respond to that within a week so that I can have it all before me on the date of sentencing. You gentlemen may very well have some complicated questions of law involved here, and rather than just a perfunctory motion at the time of sentencing, as I say, if it is involved, why submit to me a memorandum by the first of May and the government shall have a week thereafter to reply.

MR. LOWE: Judge, if I might point out, I believe the calendar indicates May 1st is a Saturday.

THE COURT: Get it in on April 30.

You will get yours in on the following Friday.

What is the situation with respect to bail?

MR. LOWE: Your Honor, I don't know exactly what it is. I believe both defendants are on personal recognizance bonds in some amount that I have no objection to continuing.

THE COURT: I think the indication in my file is that they are both released on their own recognizance.

Has there been a surrender of the passports?

MR. AIDALA: I have Mr. Rosenberg's passport. Mr. Lowe indicated he had no objection to my holding the passport.

MR. LOWE: That is correct, your Honor.

THE COURT: We will continue bail as presently set.

Gentlemen, you have an appointment with me, as I have indicated, on May 19 at 9:30. I am scheduled to be in courtroom 1505. We do get shifted around in our courtrooms. I suggest that you consult with your counsel and your counsel consult with you several days beforehand to reconfirm that you have an appointment with me. Your failure to appear before me may result in your being charged with bail jumping, a separate offense, for which the maximum penalty is five years in jail and a $5,000 fine.

You should go down to the Probation Department and get the necessary information from them.

- - -

EXHIBIT INDEX

Court	Identification	In Evidence
2	753	
3	754	

COPY RECEIVED
JUL 30 1976
ROBERT B. FISKE JR.
U.S. ATTORNEY
SO. DIST. OF N.Y.